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BETROTHMENT AND MARRIAGE



BETROTHMENT AND MARRIAGE

A CANONICAL AND THEOLOGICAL TREATISE

WITH

NOTICES ON HISTORY AND CIVIL LAW

BY

CANON DE SMET, S. T. L.

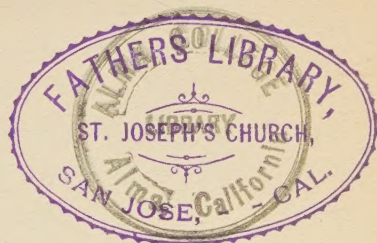
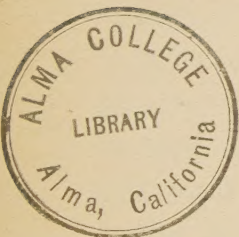
PROFESSOR OF THEOLOGY IN THE GRAND SÉMINAIRE DE BRUGES.

REVISED AND GREATLY ENLARGED BY THE AUTHOR

VOLUME I

Translated from the French Edition of 1912

BY THE REV. W. DOBELL.



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APPROBATION.

We willingly approve and highly recommend to the clergy the canonical and theological treatise, *Betrothment and Marriage*, by the Very Rev. Canon A. De Smet, S. Th. L., professor in our « Grand Séminaire » ; this work, full of solid doctrine, bears testimony to considerable labour and great discernment.

Bruges, 20 August, 1912.

† G. J., Bishop of Bruges.



PREFACE

This English translation of the treatise, *De Sponsalibus et Matrimonio*, is the second version of that work which the author has offered to the public. A French translation, from the second Latin edition, made its appearance a few months ago, and in his preface the translator claimed for it that it was more than a mere translation, that many points had, in fact, been the object of fresh study and of conscientious revision on the part of the author, so that the volume, then issued, gave to its readers the equivalent of a third edition of the original work.

The like may be said, and with even greater reason, of the present translation. Made directly from the French, its preparation has been followed throughout by the author with ceaseless care, and he has spared no pains to provide a work that should leave nothing to be desired in the way of doctrine or of erudition.

In taking upon himself this task, the author was actuated, on the one hand, by a desire to meet the wishes of many brother-priests and aspirants to the priesthood among the English-speaking clergy ; and, on the other hand, by the hope of rendering a service to the educated laity, by placing in their hands a work which would enable them to obtain first-hand information on this important subject.

Not to speak of additions and corrections, the entire translation has been supervised with the greatest care. It follows the exact lines of the original work (certain

passages of a delicate nature being left in Latin), and faithfully reproduces every chapter. In it will be found a methodical and classic exposition of the doctrine and discipline of the Church in the matter of betrothment and marriage, from the point of view of canon law and of dogmatic and moral theology, together with a commentary, as complete as possible, on the modifications recently introduced. In addition, side by side with questions that properly belong to canon law and theology, will be found notices on history and civil law, printed in a smaller type, and giving an idea of the state and development of the ecclesiastical and civil law in this matter. The parallel exposition of the two laws and of their successive changes presents an interest which there is no need to emphasise.

The work, in its English translation, is published in two volumes. An index to the complete work will appear at the end of the second volume.

In conclusion, we may observe that, for the purpose of preserving the unity of the work, and in order to avoid interfering with the original arrangement of the chapters, the author has thought it better to deal with the English and American legislation on betrothment and marriage in the form of a supplement, rather than to insert that matter in the different chapters. The reader will have no difficulty in finding the corresponding places in the body of the work.

The Translator.

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SOURCES

Without reckoning the precepts of the natural law relative to this matter, and those of the divine positive law, contained in the Holy Scriptures, the principal sources of matrimonial law are the following : *in the first place*, for the *common law*, the decrees of the œcumenical Councils and of the Sovereign Pontiffs, together with the decisions of the Sacred Congregations ; *in the second place*, for the *particular law*, the decrees of particular councils and the various diocesan decrees. These local ordinances must be taken into consideration, not only in those places in which they are binding, but also from a general point of view, since they furnish valuable suggestions for the solution of questions of the common law, as yet undecided.

We shall here confine ourselves to pointing out the principal sources of matrimonial law, both general and particular.

1. COMMON LAW.

I. Decrees of the Councils and of the Sovereign Pontiffs.

The greater part of these decrees is contained in the various collections ⁽¹⁾, such as :

A. Acts of the Councils :

HARDOUIN, *Acta Conciliorum et Epistolæ Decretales ac Constitutiones SS. Pontificum*, Parisiis, 1715 (ending with the year 1672), 12 vols. in folio ⁽²⁾.

1. The great collections do not all give the *Canones Apostolorum*, which are a collection of ordinances derived from various sources and consecrated by the usage of the primitive Church. PALMIERI gives the text of them, together with a commentary, at the end of his *Tractatus de Matrimonio Christiano*.

2. Besides the edition of Hardouin, there are also that of LABBEUS and GOSARTIUS, *Sacrosancta Concilia ad regiam editionem exacta*, Lutetiæ Parisiorum, 1671-1672, 18 vols. in folio, and that of MANSI, *Sacrorum Conciliorum nova et amplissima Collectio*, Florentiæ et Venetiis, 1759-1798, 31 vols. in folio ; since 1902, the continuation of this work has been taken in hand, and has now reached the 43rd vol. We may also mention HÉFELÉ, *Histoire des Conciles*, ed. Goshler et Delarc, Paris, 1869 ; Dom *Leclercq* is engaged in preparing a new edition, to be issued by Letouzey et Ané, of Paris ; the first vol. appeared in 1907, and the collection has at present reached the first part of the fifth volume (1912).

THEINER, *Acta genuina Concilii Tridentini*, Zagrabiae, 1874, 2 vols. in 4^{to} (1).

COLLECTIO LACENSIS, *Acta et Decreta sacrorum Conciliorum recentiorum*, Friburgi Br., 1870-1890 (to the Vatican Council inclusively), 7 vols. in folio.

B. Bullaria :

Bullarum, privilegiorum ac diplomatum Rom. Pontificum amplissima collectio, opera C. Cocquelines, Romæ, 1733 ss. — From Leo the Great to Benedict XIV exclusively (1470), 28 vols. in folio (2).

Bullarium Benedicti XIV, Mechliniæ, 1826, 13 vols. in 12^{mo}.

Bullarii Romani Continuatio (from Clement XIII to Gregory XVI inclusively), opera Barbéri et Spetia (vols. 1-5) necnon R. Segreti (vol. 6 and following), Romæ, 1835-1859, 20 vols. in folio.

Acta Pii IX, Romæ, 1848-1865, 3 vols.

Allocutiones, Epistolæ, Constitutiones aliaque acta præcipua Leonis XIII (1870-1900), Brugis, 8 vols. in 8^{vo}.

Among the more important Constitutions and Acts of the Sovereign Pontiffs in the matter of marriage, we may mention : the Constitutions of *Pius V*, *Sanctissimum*, of 20 Aug. 1566 ; *Ad Romanum Pontificem*, and *Cum illius*, of 28 Nov. 1566 ; *Ad Romanum*, of 1 July 1568 ; the Constitution of *Sixtus V*, *Cum frequenter*, of 22 June 1587 ; the Constitutions of *Benedict XIV*, *Dei miseratione*, of 3 Nov. 1741, and *Matrimonia*, of 4 Nov. 1741 ; the Constitution of *Pius V*, *Auctorem Fidei*, of 28 Aug. 1794 ; the *Syllabus* of *Pius IX* ; the Constitution of *Leo XIII*, *Arcanum*, of 10 Feb. 1880.

C. The Corpus Juris, comprising :

1. The *Decretum* of Gratian (3), or *Concordia discordantium canonum* (4) ; marriage is there treated of in Part 2, *Causa XXVII-XXXVI*.

1. A new and very complete edition of the Acts of the Council of Trent is in preparation, the commencement of which has already appeared, under the title : *Concilium Tridentinum, — Diariorum, Actorum, Epistolarum, Tractatum Nova Collectio*, Friburgi Br. 1901. Vol. 1 and 2 (constituting the 1st and the 2nd part of the « *Diaria* ») have appeared, as also vol. 3 and 5 (constituting the 1st and the 2nd part of the « *Acta* »).

2. From the sixth vol onward, this collection is entitled : *Bullarium Romanum*.

3. This immense collection of canons and decrees was preceded by several compilations of less importance, notably by : *Burchardi Wormatensis Decretorum Libri XX*, and by the work of Ivo of Chartres : *Panormia Ivonis Carnutensis* (of which books 6 and 7 concern marriage).

3. Besides constituting a collection of canons and papal decrees, the *Decretum Gratiani* is at the same time a canonical treatise, especially in the *Dicta*.

2. *The Decretals of Gregory IX* ⁽¹⁾, in five books, of which the fourth book treats of marriage.

3. *The sixth book of the Decretals* of Boniface VIII, of which book 4 devotes three titles to the question of marriage.

4. *The Clementine Constitutions*, the fourth book of which is concerned with this subject : it comprises only one title consisting of a single chapter ⁽²⁾.

NOTE. a/ *The Compilationones antiquæ* may also be of some service. They are five in number, and are all antecedent to the collection of the Decretals of Gregory IX.

b/ We make use of the critical edition of *Em. Friedberg*, both for the *Compilationones Antiquæ* ⁽³⁾ and for the *Corpus Juris* ⁽⁴⁾.

c/ Quotations from the *Decretum of Gratian* are made thus : c. 1, C. XXX, 3 = chapter 1, Causa XXX, question 3 ; those from the *Compilationones*, thus : Comp. I, c. 3, IV, 3 = Compilation I, chapter 3, book IV, title 3 ; for the *Decretals* of Gregory IX : c. 2, X, IV, 3 = chapter 2, book IV, title 3, while the letter X denotes that the Decretals of Gregory are referred to ⁽⁵⁾ ; in our references to the *sixth book of the Decretals*, we write : c. 2, in VI^o, IV, 3 ; * for the *Clementine Constitutions* : c. un., in Clem., IV, 1.

d/ The substance of the greater part of the canons and decrees will be found in DENZINGER, *Enchiridion Symbolorum, definitionum et declarationum*, 10th ed. (Bannwart), Friburgi Br., 1908 ; and also in SCHNEIDER, *Fontes Juris ecclesiastici novissimi*, Ratisbonæ, 1895.

Note. For passages taken from the works of the Fathers and ecclesiastical writers, we shall refer principally to MIGNE, *Patrologiæ cursus completus* ; the first series of his Patrology (162 vols.) contains the *Greek* Fathers and writers ; the second (221 vols.) the *Latin*. We shall quote the Apostolic Fathers from FUNK, *Opera Patrum Apostolicorum*, 2 vol., Tubingæ, 2^a ed., 1887 (a new edition there appeared in 1901). Recently also has been published

1. This collection especially contains the canons and decrees later than Gratian, together with the earlier decisions omitted by him.

2. The *Extravagantes* have nothing on the subject of marriage ; *liber quartus vacat* (i. e., remains unwritten).

3. *Quinque Compilationones Antiquæ, necnon Collectio Canonum Lipsiensis*, Lipsiæ, 1882, 1 vol. in 4^{to}.

4. *Corpus Juris Canonici*, Lipsiæ, 1879-1881, 2 vols. in 4^{to}.

5. The letter X is an abbreviation of the word *Extra* (outside), which formerly served to denote the Decretals of Gregory IX, because they constitute a collection outside of the *Decretum of Gratian*.

Enchiridion Patristicum, by the care of ROUËT DE JOURNEL, Freiburg Br., 1911, to which collection of texts we shall refer now and then.

II. Decrees of Roman Congregations.

For our purpose, the most important decisions are those of the S. Congr. Concilii, of the Congr. S. Officii, of the S. Congr. de Propaganda Fide, and of the recently instituted S. Congr. de Sacramentis. They may be found, in part, in the various Collections, of which the principal are : the *Thesaurus resolutionum S. Congr. Concilii* (commencing with 1718), Romæ, 1739-1903 (162 vols.) ; PALLOTINI, *Collectio omnium conclusionum et resolutionum quæ in causis propositis apud S. Congr. Concilii prodierunt ab a. 1564 ad a. 1860*, Romæ, 1867-1893 (17 vol.) ; *Collectanea S. Congr. de Propaganda Fide*, Romæ, 1893 ⁽¹⁾ ; in part, in periodicals, such as the *Acta S. Sedis*, *Analecta Juris Pontificii*, *Canoniste Contemporain*, *Il Monitore ecclesiastico*, *Analecta ecclesiastica*, and other reviews, which we shall quote as occasion requires. Since 1 Jan. 1909, the acts of the Holy See and the Roman documents appear in an official Commentary, entitled *Acta Apostolicæ Sedis*.

OBSERVATION. Beside the acts of the Councils and of the Popes, and the decrees of the Roman Congregations, it is useful also to consult, for the common law, the *Rituale Romanum* and the *Catechismus Concilii Tridentini*.

Moreover, one can consult on the sources of matrimonial law : TARDIF, *Histoire des sources du droit canon*, Paris, 1889 ; LAURIN, *Introductio in corpus juris canonici cum appendice brevem introductionem in corpus juris civilis continente*, Friburgi Brisg., 1889 ; VERING, *Lehrbuch des katholischen, orientalischen und protestantischen Kirchenrechts*, Freiburg in Br., 1893, p. 37-389 ; VIOLLET, *Histoire du droit civil français*, 2^e éd., Paris, 1893, Livre I^{er} : Les sources ; WERNZ, *Jus Decretalium*, I, Romæ, 1898 ; SÄGMÜLLER, *Lehrbuch des katholischen Kirchenrechts*, Freiburg in Br., 2nd ed., 1909 ; DE BRABANDERE-VAN COILLIE, *Juris Canonici et juris canonico-civilis compendium*, ed. 7^{ma}, Brugis, 1903.

1. There exists another edition of this *Collectanea*, in two volumes and arranged in chronological order ; it appeared in Rome in 1907 ; our quotations, however, are ordinarily made from the first edition, which is better known and handier ; in exceptional cases we have recourse to the other, which we then quote as *Collectanea*².

2. PARTICULAR LAW.

The general collections which we have mentioned above contain many provisions of particular law, especially canons of national and provincial Councils. In addition to these, there are special collections which give the acts of national Councils exclusively. We may mention the *Concilia Antiqua Galliæ*, ed. *Sirmundi*, Lutetiæ Parisiorum, 1629, 5 vols. in folio, with a supplement ; the *Concilia Germaniæ*, ed. *Schannat et Hartzheim*, Coloniae Augustae, 1759-1775, 10 vols. in folio ; the *Synodicum Belgicum*, that is to say, the Acts of all the Churches of Belgium, from the Council of Trent to the Concordat of 1801, ed. *De Ram*, Mechliniæ et Lovanii, 1828-1858⁽¹⁾ ; *Concilii Plenarii Baltimorensis Decreta*, of 1866 and 1884 (2nd and 3rd Councils), Baltimore, Murphy ; *Acta et Decreta Concilii Plenarii Americæ Latine* (held in Rome in 1899), Romæ, 1900, 2 vols.

It is right also to mention the *Instructio Austriaca* (or Instruction of Cardinal Rauscher) *pro judiciis ecclesiasticis quoad causas matrimoniales*, in the *Collect. Lacens.*, t. V, col. 1287 ss. ; as well as the *Schemata et Postulata in Concilio Vaticano proposita*, in the *Collect. Lacens.*, t. VII, and in MARTIN, *Omnium Concilii Vaticani documentorum Collectio*, Paderbornæ, 1873.

For the particular law of the **Diocese of Bruges**, we have principally made use of the *Liber Manualis Sacerdotum Dioecesis Brugensis*, 2^a ed., Brugis, 1900 ; of the *Collectio Epistolarum pastoralium, Instructionum, et Statutorum Episc. Brug.* (1883-1903), 17 vols. ; of the *Pastorale Dioecesis Brugensis*, Gandavi, 1838 ; and of the *Statuta Dioecesis Brugensis*, ed. 2^{da}, Brugis, 1890.

Notes. As concerns the **Civil Law**, as a general rule, in the course of this work we take into consideration only the legislation of the *Code Napoléon* (promulgated the 21 March 1804, and known by its present name since 3 Sept. 1807), which has remained in force in Belgium and France, almost in its entirety, to the present day⁽²⁾. We follow the text of the Belgian Civil Code, while mentioning, as occasion requires, the modifications introduced into France, and the parallel legislation of other countries⁽³⁾, as well as the provisions of the old Roman Law.

1. This collection contains only the Acts of the dioceses of Malines, Ghent and Antwerp.

2. Many codes of other countries are based on the principles that inspired the Code Napoleon, as is shown by PLANIOL, *Traité élémentaire du Droit civil*, 5^e éd., Paris, 1908-1909, t. I, nos 138 ss.

3. We give as a supplement at the end of the treatise, the principal matrimonial provisions of the English law and of the legislation in force in the United States ;

With regard to the sources : besides the *Corpus Juris Civilis*, *Coloniæ*, 1624 ⁽¹⁾, for the Roman law, we refer, for the Belgian law, to the following sources : *Les codes Belges et les Lois spéciales les plus usuelles*, ed. *Servais et Mechelynck*, Bruxelles, 1910 ; *Le Moniteur* ; *Les Annales Parlementaires et Documents Parlementaires* ; *Pasinomie* ; *Pasicrisie Belge* ⁽²⁾ ; *Pandectes Belges* (Picard et d'Hoffschmidt); for the legislation of other countries, we have most frequently had recourse to LEHR, *Le Mariage, le Divorce et la séparation de corps dans les principaux pays civilisés*, Paris, 1899 ; and ROGUIN, *Traité de Droit civil comparé — Le Mariage*, Paris, 1904 ; in addition, for the juridico-civil part of our treatise, we have examined a number of works and periodicals mentioned in the Bibliography.

also the dispositions of the new German Code, promulgated 18 Aug. 1896, and in force since 1 Jan. 1900 ; we likewise give a short resumé of the Canadian law.

The text of the German Code, together with a commentary, may be found in LEHMKUHL, *Das Bürgerliche Gesetzbuch des Deutschen Reiches*, 7 Aufl., Freiburg in Br. ; DE MEULENAERE, *Code civil Allemand et Loi d'introduction*, Paris, 1897, gives a French translation of it.

1. Cf. LAURIN, o. c., part 2. The greater part of the *Corpus Juris Civilis* consists of the *Digesta* or *Pandects* of the emperor Justinian (πᾶν and δεχομαι = I contain, hence : a compilation of all the laws). The *Digesta* or *Pandects* are designated by the letters D and P or Π, or again by ff. (see LAURIN, o. c., p. 248). In the quotations, L. 1, D, I, 5 signifies : 'Law 1 of the Dig., Book I, Title 5. The best edition of the *Corpus Jur. Civ.* is that of *Mommsen-Krüger-Schoell*.

2. There is also a very useful decennial collection commenced in 1880 and extending to 1909 inclusively, under the title of : *Répertoire décennal de la jurisprudence Belge*. To the *Pasicrisie* there is also added a juridical review entitled : *Revue de Droit Belge*.

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- Examen du pouvoir législatif de l'Eglise sur le mariage, Paris, 1817.
- FAGNANUS, *Jus Canonicum, sive Commentaria absolutissima in Quinque Libros Decretales*, Coloniz, 1676-1682, 3 vol. — In L. IV^m.

1. We have not included in this list *general* theological treatises, whether dogmatic or moral, nor compendiums of theology, though we have sometimes referred to them. Among the Authors given here, we have marked with an asterisk those that we consider the best and most serviceable for our present purpose. Those thus marked may suffice for beginners.

- FERRARIS LUCIUS, *Prompta Bibliotheca*, Migne, 1852-1858, cum Supplemento, Romæ, 1899 : V^o *Matrimonium, Sponsalia*.
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BOOK I

BETROTHMENT

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BETROTHMENT

Division.

The *first* chapter of this book will be devoted to the *nature* of betrothment. We shall treat successively of the meaning, division, and expediency; the constituent elements; the subject-matter and the various adjuncts of the sponsalital contract. The *second* chapter will deal with its *effects*; the *third* with its *impediments*; the *fourth* with its *dissolution*; and the *fifth* with its due *regulation*. This will be followed by an *appendix* treating of the *antenuptial proclamations*.

1.
Division

CHAPTER I.

THE NATURE OF BETROTHMENT.

ARTICLE 1. Meaning, Division, and Expediency.

Betrothment, called in Latin *Sponsalia* ⁽¹⁾ *de futuro* ⁽²⁾, may be

2.
Meaning.

1. *Sponsalia* are so called *a spondendo*. « This expression of the Roman law had its origin in the practice that prevailed among the ancient Romans. He who wished to marry a girl addressed to her father or guardian the recognised formula : *spondesne* ?, and he replied : *spondeo*. Hence she who was thus promised in marriage was known as the *sponsa*, and he, to whom she was promised, as the *sponsus* ;... the day, on which the promise was made, was the *dies sponsalis*, and the entire transaction, or promissory contract, was called the *sponsalia* ». WERNZ, O. C., IV, n. 86. Cf. also LAFOURCADE O. C., p. 46 ; SEHLING, *Die Unterscheidung*, p. 20-21, who remarks : « Später blieben die Ausdrücke *sponsa*, *sponsalia* bestehen, trotzdem an Stelle der sponsio die freie Consenserklärung trat ». The word *sponsalia* is also used in a wider sense, to denote the gifts that were mutually given by the betrothed parties.

Before the *sponsalia*, the future *sponsa* was successively called the *sperata*, when her future husband began to court her, and the *pacta*, when the young man had been accepted by her family. LAFOURCADE, O. C., p. 76.

2. The limiting phrase « *de futuro* » first appears in William de Campellis

defined as a *a mutual promise of future marriage, or a contract by which a man and a woman engage themselves to marry.*

Betrothment is a real contract, i. e. an agreement between a man and a woman, by which they mutually give and mutually accept a binding promise to enter into matrimony at a future date.

Hence it is not sufficient that there should be a mere proposal, or a promise on the part of one, even though that promise be accepted by the other. Both the promise and the counter-promise are requisite, so that the contract may be strictly bilateral and perfectly synallagmatic ⁽¹⁾, binding in justice both parties to a future marriage.

If one party alone promises, and the other party accepts that promise, but gives no counter-promise ⁽²⁾, an obligation ⁽³⁾, sometimes even binding in justice ⁽⁴⁾, may indeed arise, but it is not of

(d. 1121). It soon became customary, from the time of Peter Lombard. It was introduced to distinguish the sponsalital contract from the contract of marriage itself. In the terminology that was then in vogue a married woman who had not yet had carnal intercourse with her husband was commonly called *sponsa*, in opposition to one who had had such intercourse, and was then termed *nupta*. Thus a marriage not consummated came to be included under the term *sponsalia*, and confusion consequently arose. To avoid this, the authors of that day called the marriage contract *sponsalia de praesenti*, but the sponsalital contract, which preceded marriage, *sponsalia de futuro*.

1. A contract is perfectly synallagmatic : « quand les parties se soumettent par le fait même de la convention, à des engagements réciproques, qui forment ou qui sont censés former pour chacune d'elles l'équivalent de la prestation à laquelle elle a droit ». Mgr. WAFELAERT, *De justitia*, t. I, n. 340, in agreement with Aubry & Rau.

2. The acceptance of a promise does not of itself imply a counter-promise; for, it may very well happen that one may accept a promise of marriage without binding himself to the other party. Nevertheless it frequently happens that the acceptance of a promise, having regard to the circumstances in which it is made, carries with it the force of a counter-promise. Cf. SCHMALZGRUEBER, in l. IV Decret., tit. I, nn. 44-46.

3. In the abstract, indeed, from a promise of this kind, followed by no counter-promise, an obligation of marrying may arise, if the person to whom the promise has been made exacts it. But, looking at the matter in the concrete, the alleged obligation may, as a rule, be neglected. Ordinarily, in promising marriage, one does not intend to contract the obligation of marrying, except in so far as the other party consents by a counter-promise to the same obligation.

4. As a general rule, the promise brings with it merely an obligation of *fidelity*, that is light in itself. Nevertheless, from the intention of him who makes the promise (of which we must often judge from the attendant circumstances), a grave

a sponsalitial nature, and the proper effects of betrothment must be denied to such a promise.

The *object* of the contract is the *future marriage*, to be entered into at a fitting time, that is to say, at a time expressly determined in accordance with the wishes of the parties, or at a time to be reckoned according to the circumstances of the case and local customs (¹).

In consequence of the nature of the object with which the contract is concerned, the contracting parties must be a *man* and a *woman*, and indeed a *determinate* man and a *determinate* woman (²).

Different kinds. Betrothment is : — 1. either *solemn* or *clandestine*. It is solemn, when celebrated in the form constituted by public authority ; if otherwise, it is clandestine. Thus betrothment is clandestine not only when contracted privately and secretly, but also when it takes place in public, but without the prescribed formalities.

3.
Different
kinds.

2. *Absolute* or *conditional*.

3. *Confirmed* or *simple*, according as it is or is not strengthened by the giving of a pledge, by oath, or by other stipulations of a penal nature, to be enforced against those who draw back from the agreement.

Expediency demands that betrothment should precede marriage, though no obligation arising from the nature of things or from any ecclesiastical precept, makes it necessary that it should obligation of justice may arise. Cf. Mgr. WAFFELAERT, o. c., I, n. 534 ; *Collat. Brug.*, t. II, p. 130 ss. ; see below n., 18, in note.

4.
Expediency.

1. With regard to the proper interval between betrothment and marriage, according to the Roman law, cf. SEHLING, *Unterscheidung*, p. 21-22 ; ROCHE, o. c., p. 8 s. ; LAFOURCADE, o. c., p. 74 ; for the German custom, *ibid.* p. 40.

2. WERNZ, o. c., IV, n. 98, remarks : « A promise, even with a counter-promise duly accepted, of marrying one of three sisters at the choice of the man, does not induce any sponsalitial obligation, although another promissory contract certainly does arise... ; in like manner there is no betrothment where a man merely promises a girl that he will not marry anyone else, unless it is clear from the circumstances that the party giving the promise, notwithstanding his negative and conditional way of speaking, had a *positive* and *absolute* intention of marrying this particular girl and no other ». Under the new discipline of the Decree *Ne Temere* (cf. n. 6.) this observation finds no place, since betrothment, under the Decree, cannot be understood to have taken place except between two determinate persons.

do so. Betrothment serves as a barrier against ill-omened haste ; it renders the position of the engaged parties more secure ; and it affords a better opportunity for bringing to light any impediments or incompatibility of disposition that may exist ⁽¹⁾. It was in use among the Jews ⁽²⁾, the Romans ⁽³⁾, the Germans ⁽⁴⁾, and the Christians of the primitive Church ⁽⁵⁾. On the other hand in many modern codes, as in the Code Napoléon, and many others ⁽⁶⁾, betrothment is not recognised, and is without any binding force, though, in certain cases, it may afford ground for an action for damages (below, n. 17). Cf. LAFOURCADE, O. C., p. 199 ss., where he shows that, under the code Napoléon, matrimonial promises are null in law with the nullity « *d'ordre public* », as being opposed to freedom of marriage. Cf. also ESCARD, I. C., p. 888 ss. ⁽⁷⁾.

ARTICLE 2. The constituent Element of Betrothment, or the Consent.

5.
*Characteris-
tics of
sponsalitial
consent.*

The constituent element of betrothment, as we gather from the very idea of the contract, is mutual consent to a future marriage. In the sponsalitial contract, as in every other, this consent ought to be *internal, free, outwardly expressed, absolute, simultaneous and legitimate*. Now, in accordance with the nature of the object towards which it is directed, the sponsalitial contract ought to be in a special way, like the contract of marriage itself, a matter of *individual and personal* consent, since it promises that which is within the disposal of the contracting parties alone. We shall speak of these general characteristics of consent when we come to

1. Cf. ROUSSEAU, *Revue des Sciences Ecclésiastiques et la Science Catholique*, II, p. 176 s. Cf. also *Instructions du Vicariat de Rome*, I. C., p. 596, where the parish priests are admonished to have the betrothals celebrated.

2. The betrothal, in which the parents promised to give the girl in marriage to the man, was called *Thenain* or *Schidduchin*.

3. L. 2, Dig., XXIII, 1.

4. Cf. PUTON, O. C., p. 65 s.

5. WERNZ, O. C., IV, n. 88. In some places betrothment was even obligatory. Cf. COLIN, O. C., p. 130.

6. This is the case in Italy, Holland, Spain, and Portugal ; it is otherwise in England and Germany.

7. The author there explains the various methods of betrothal at present in vogue in certain countries, and expresses the wish that this contract may again find a place in the civil law.

the question of matrimonial consent, and what we say there may be applied here. For the present, it is sufficient to remark that, for the *lawfulness* of the consent, it is requisite that it be given by those capable of the sponsalial contract, and according to the form prescribed for its validity. In determining the capability of the parties and the form of the contract, we must attend not only to the requirements of the *natural law*, but also to those of the *positive law*, as laid down by that authority to which the sponsalial contract is subject. We shall show below that, for the betrothment of Christians, this authority resides in the Church, and that for non-Christians, it lies with the head of the State.

What concerns the capability of the contracting parties, will be explained in chapter III, under the head of impediments to betrothment. At present it only remains to describe briefly the formalities of consent.

Formalities of consent.

I. As far as the **natural law** is concerned, no particular formality 6.
Formalities : or solemnity is required. In whatever way the consent is expressed, it is valid, provided it be given in accordance with the conditions enumerated above. Thus silence itself, in certain circumstances, may be enough for a sufficiently certain presumption of consent (¹). In like manner the *copula* (sexual intercourse) may easily imply sponsalial consent : *in foro externo* it is *presumed* to do so, in the
natural law ; not indeed indiscriminately and taken by itself, but when effected under certain circumstances ; of such a kind is the *copula* following on a promise or proposal of marriage made to a woman who is virtuous and a virgin ; for, it is considered, as SANTI reasons (o. c., l. IV, tit. I, n. 27), that she would not have yielded herself to

1. In this sense decrees cap. unic., in VI^o, IV, 2 : « Moreover those betrothments, which parents commonly make on behalf of their children, whether of a marriageable age or not, bind the children themselves, if they have given their consent thereto expressly or tacitly, as being present without protesting ; and the contract gives rise to the impediment of public decency. The same holds good if the children were absent at the time of the betrothal, and even ignorant of it, but afterwards, when it came to their knowledge, tacitly or expressly ratified it. Without this express or tacit consent, children are not bound by a betrothment made by their parents on their behalf, and no impediment of public decency arises in consequence of it ». Cf. SANTI, on this passage, n. 14 and 24 ; *Anal. eccles.*, 1901, p. 45 s.

the man except on the understanding that the marriage, to which she trusted for the safeguarding of her honour, should duly take place ⁽¹⁾).

in the positive law of the Church: II. Turning now to the **positive law**, we find that until quite recently the Church had prescribed no formality or solemnity as necessary for the validity of betrothment among the faithful ⁽²⁾, so that any betrothment, however clandestine it might be, was perfectly valid in the eyes of the Church.

before Easter 1908 ; Under this discipline serious inconveniences existed ⁽³⁾, and many bishops in the past had endeavoured to obtain from the Holy See some modification of the law, but without success; their petitions did not find favour, and those diocesan decrees, which had presumed to prescribe a solemn form for the validity of betrothment, were severely reprobated ⁽⁴⁾. The first modification

1. With regard to this presumption, note : a) that we say « *in foro externo* », since in this alone the presumption holds good. *In foro interno* the validity of the betrothment depends on the intention of the woman when admitting the *copula*. Even *in foro externo* this presumption is not « *juris et de jure* », that is to say, it is not a necessary presumption, but falls to the ground as often as it can be established that there was a contrary intention on the part of the woman. b) For this presumption *in foro externo* both the elements, of which we have spoken above, viz., the virtuousness of the woman, and the previous promise of marriage, clear and certain, on the part of the man, are required. For the proof of this promise, marks of love given by the man do not suffice. Hence it happens, as SANTI remarks (l. c.), that « in nearly all the causes brought before the S. Congregation of the Council in our days, actions concerning the validity of betrothment, have failed, though the *copula carnalis* was there, and had been preceded by expressions of love and frequent familiar intercourse ».

2. In these countries betrothment of non-Christians is subject only to the requirements of the natural law, since, as we have remarked, the civil power has decreed nothing concerning them.

3. « Docuit enim experientia satis quae secum pericula ferant ejusmodi sponsalia : primum quidem incitamenta peccandi, causamque cur inexpertae puellae decipiantur ; postea dissidia ac lites inextricabiles ». Cf. Decretum *Ne Temere*, given at the end of this volume, also *Collat. Brug.*, t. XIII, p. 53 s.

4. FEYER, *De Imp.*, n. 538 ; WERNZ, o. c., IV, n. 39 and 99 ; DE BECKER, *De Matrim.*, 2-3 ; GASPARRI, o. c., t. I, n. 24 & 25 ; N. R. th., t. XXV, p. 92 ss., and especially *Can. Contemp.*, 1898, p. 489 ss. and 1905, p. 579, where the case of 17 June 1905 is given, in which the S. C. C. replies : *Dilata*. Moreover, a proposal decreeing « eos omnes, qui in posterum sine testium saltem trium praesentia matrimonium vel sponsalia contrahere attentaverint, ad sic contrahendum inhabiles fore, et contractus hujusmodi ab eis fieri attentatos irritos esse et nullos », was rejected by the Council of Trent. THEINER, o. c., II, p. 339.

of this law was granted in the case of Spain. On 31 January 1880, the Holy See declared that betrothals contracted there were invalid *absque publica scriptura*, i. e., without the presence of a notary, and that, moreover, the absence of this formality could not be made good « by an instrument drawn up in the (episcopal) court, granting a dispensation from any existing impediment ». This modification was introduced out of regard for the custom that existed in Spain, and required the said formality, from the time of the Pragmatic Sanction promulgated in the year 1803 ⁽¹⁾.

More recently, 1 January 1900, Leo XIII, assenting to the petition of the Fathers of the Council of Latin America presented in 1899 ⁽²⁾, extended to Latin America the discipline that prevailed in Spain.

Finally a new order of things was introduced by the famous decree *Ne Temere*, published by the S. C. C., 2 August 1907 ⁽³⁾, and coming into force at the following Easter 1908. after Easter
1908 :

It is there laid down that : « *Only those (betrothments) are considered valid and produce canonical effects which have been contracted in writing signed by both the parties and by either the parish-priest or the Ordinary of the place, or at least by two witnesses.*

In case one or both the parties be unable to write, this fact is to be noted in the document and another witness is to be added who will sign the writing as above, with the parish-priest or the Ordinary of the place or the two witnesses. »

1. Cf. GASPARRI, o. c., n. 26 ; *N. R. th.*, t. XXIV, p. 134 ss., where is given the Decree of the S. C. C., of April 1891, to the effect that the declaration of 1880 was still in force, notwithstanding the change in the civil code of Spain.

2. Cf. *Postulata Patrum Concilii Plenarii Americae Latinae*, ad V : « that your Holiness deign to extend to all countries of Latin America the declaration of the Sacred Congregation of the Council, published for Spain on 31 Jan. 1880.... i. e. that betrothals contracted in our countries *absque publica scriptura* be invalid, and that no matrimonial information, nor any document drawn up in the diocesan court, or elsewhere, granting a dispensation from any existing impediment, whence it may be inferred that a promise of marriage was seriously made, be competent to supply for the absence of such *publica scriptura* ». To this the S. C. *negotiis eccles. extraord. praeposita* replied : « ad V., *pro gratia in perpetuum* ». Cf. *Acta Sanctae Sedis*, XXVII, p. 553 ss. ; *Acta et Decreta Concilii Plenarii Americae Latinae*, n. 592, cum nota.

3. The text of the Decree will be found at the end of this work. For the general economy of the same, see below, where we speak of the formalities of marriage.

7. —
the Decree
Ne temere
requires for
the validity of
betrothment,

A brief commentary will make clear the effect of this clause :

1. A formality, which we shall presently describe, has been introduced, and the observance of it has been made necessary for the very validity of the betrothment.

Everyone is agreed that betrothments contracted without these formalities are null in the *forum externum*, and produce no canonical effect properly so called ; that is to say, they are not recognised by the Church, and give rise to no impediment of public decency, and to no obligation to marry that can be invoked in the *forum externum*. There is a question, however, whether betrothment without the prescribed solemnity is invalid *only* in the *forum externum*, or whether it is altogether worthless and without effect, even *in foro conscientiae*, so as to be as if it were simply non-existent ⁽¹⁾. The former opinion seems more conformable to the tenor of the Decree ⁽²⁾ though the latter is preferred by the majority of authors ⁽³⁾, and it is said that it will receive the confirmation of the Holy See. Until the controversy is settled, the obligation in conscience is theoretically doubtful, and may be regarded as practically null ⁽⁴⁾.

1. Incidentally a variety of obligations may arise from such invalid betrothments : e. g., the reparation of injury caused by deceit or sexual intercourse extorted under the pretext of such a promise. See below, n. 18, in note.

2. Cf. the Author's commentary (Bruges, 1908), p. 12 ss. ; VAN DEN ACKER, o. c., p. 2, concedes the same.

3. Thus R. P. VERMEERSCH, *Ne temere*, n. 35 ; CARD. GENNARI, o. c., p. 19 s. ; OJETTI, *In jus pianum*, n. 49 ; DE BECKER, *Legislatio Nova*, p. 20 ; BESSON, in *N. R. th.*, 1907, p. 613 ss. ; CHOUPIN, o. c., n. 8 ; HIZETTE, o. c. p., 18 ; ALBERTI, o. c., p. 8 ; DOMAICA, o. c., p. 31 ; *Ned. Kath. Stemmen*, 1907, p. 330 ; ARENDT, o. c., p. 165 ss. ; WOUTERS, o. c., p. 29 s. ; STANDAERT, *Collat. Gandav.*, 1909, p. 304 s. ; VAN DEN ACKER, l. c. ; DE ARQUER, o. c., n. 10 and 28 ; *The Month*, 1908, I, p. 635 ; ARRIBAS, o. c., p. 30 s. ; TRENTA, o. c., p. 20 s. ; PEZZANI, o. c., p. 45 ss. ; BARRETT, o. c., p. 20 s. ; CREAGH, o. c., p. 25 ; DEVINE, o. c., p. 284 ; CRONIN, o. c., p. 299 ss. ; VOGT, o. c., p. 19 ; KNECHT, o. c., p. 73 s., where the reply of the S. C. C. 26 Feb. 1908, regarding this, is quoted. On the other hand the validity and efficacy of such betrothments are vindicated by BOUDINHON, *Le Mariage et les Fiançailles*, n. 36, and HEINER, *Ne Temere*, p. 49 s. NOLDIN, *Decretum de Sponsalibus et Matr.*, n. 7, and after him, KARST, o. c., p. 19, in note, acknowledge that these betrothals have efficacy *in foro interno*, but illogically restrict it to the obligation of mere fidelity.

4. The provisions of the Decree *Ne Temere* regard betrothals only, and so do not seem to apply to a *non-sponsalitiul* promise of marriage ; e. g., to a promise given by one party, which the other party accepts without giving a counter-promise. In our opinion, such a unilateral promise retains its natural efficacy (see n. 2).

2. The formality required by the Decree consists in this : — *that the contract be in writing, and that it be signed by both the contracting parties and either by the parish priest, or by the Ordinary* ^{(1), or at least by two witnesses ;} but with this proviso, that in case the contracting parties, or one of them, be unable to write, another witness must be added, who shall sign the contract in the place of them, or of the one of them, mention of the inability to write being made in the document ⁽²⁾. *that the document be duly signed,*

Moreover, this document must be signed *on the same occasion* by the contracting parties, or by their respective proxy, together with the parish priest, or the Ordinary, or the two witnesses. It will not suffice that the document be signed by one party in the presence of, and together with the parish priest or the two witnesses, and then be sent to the other and absent party, for his signature together with that of the parish priest or witnesses ⁽³⁾. The signatory parties must both be present at the same time, and they must sign their names in the actual presence of the witnesses, *present at the same time*, so that these may be able to testify that the consent of each of the betrothed parties was given in writing ⁽⁴⁾.

It is also required for the validity of the betrothment that the *date* — day, month, and year — be given in the document ⁽⁵⁾. *and dated.*

The Ordinary or parish priest, in order to sign as the qualified

The following have written in this sense : VERMEERSCH, o. c., n. 28 ; CARD. GENNARI, l. c. ; OJETTI, o. c., n. 50 ; ALBERTI, l. c. ; CHOUPIN, o. c., n. 6 ; HIZETTE, l. c. ; ARENDT, l. c. ; WOUTERS, o. c., p. 30 s. ; VAN DEN ACKER, o. c., p. 11 ; STANDAERT, l. c. ; but DE BECKER (l. c.) is of the contrary opinion.

1. We shall explain below, when treating of the formalities of marriage, who come under the terms *Ordinary* and *parish priest*. It is not necessary, as for marriage, that they should be requested and invited to assist at the betrothal.

2. Observe that it is sufficient that the *signatures* be in the handwriting of the signatories. The rest of the document may be written by another hand, or even printed ; but the employment of a stamped fac-simile of signature, or of a typewriter for the signature would invalidate the deed.

3. Decree of the S. C. C., 27 July 1908 ad 1, towards the end.

4. Nevertheless if one of the contracting parties be absent, there is no reason why he should not name a proxy to be present and sign the contract in his place, mention being made of the fact that he does so as proxy. See below, n. 70.

5. The same Decree, 2. It is advisable to add the name of the place, but this is not essential : this may serve as a proof that the parish priest of the place signed the document. An error in the date, even involuntary, would render the validity at least doubtful.

witness (1), must be the Ordinary or parish priest *of the place*, within the limits of which the contract is signed. It does not matter, as far as validity or even strict lawfulness is concerned, whether the Ordinary or parish priest be that of the contracting parties or not (2). They cannot, however, depute another to act for them (3).

8.
*Extent of the
Decree.*

3. The discipline, which we have just described, extends to all betrothals contracted between parties, of whom one at least is a Catholic of the Latin rite (4). A fuller explanation of this will be given below, when treating of the formalities of marriage.

The provisions of the Decree affect only betrothments « *exinde celebranda* », that is to say, such as are subsequent to Easter Sunday (19 April) 1908 ; and they have no retrospective force : hence betrothments anterior to that date are not subject to the exposed regulations.

9.
*Betrothments
presumed, or
consequent on
sexual in-
tercourse, are
practically
obsolete.*

Corollary. For betrothments under the Decree *Ne Temere*, there is no need to take into consideration the enactment of the Canon law, in other respect of but little practical importance, regarding *presumed* betrothment. According to § 1, cap. unic., in VI^o, IV, 2, (5) and c. 14, X, IV, 2, marriages invalidly contracted *per verba de praesenti* by impuberals not very near to the age of puberty, and in whom precocity did not supply the want of age, implied *sponsalia de futuro*, and consequently the impediment of public

1. Where a parish priest acts as an ordinary witness, signing together with another witness, it is indifferent whether he be the parish priest of the place or not.

2. Decree of the S. C. C. 28 March 1908, ad 7 ; cf. *Collat. Brug.*, t. XIII, p. 470 s., where it is said that the parties should be *advised* to go to their *own* parish priest, and, when two parishes are concerned, to the parish priest of the bride, in whose parish the betrothal should take place.

3. The same Decree, ad 6. This provision is conformable to the office in question ; for, the parish priest exercises no jurisdiction here, he is simply an authorised witness, and this office cannot be delegated, unless by express permission. Moreover, the absence of the parish priest may be supplied by the presence of two witnesses.

4. It extends also to betrothals contracted in Spain and in Latin America ; and the form established for those countries by special provision of the canon law has been abrogated. Cf. Decr. S. C. de Sacr., 12 March 1910, ad 7.

5. « Si pubes et impubes, vel duo impuberes, non proximi pubertati, et in quibus aetatem malitia non supplebat, per verba contraxerint de praesenti *sponsalia enim illa, quae juris interpretatione tantum fuerunt sponsalia de futuro*,... per adventum pubertatis in matrimonium non transeunt de praesenti...; per dictum tamen contractum, qui valuit ut potuit, non sicuti agebatur, publicae honestatis iustitia est inducta ».

decency within the first degree, provided that the marriage contract was not invalid either from the want of consent (¹), or on the ground of clandestinity (²).

In like manner the question raised above (n. 6), viz., how far betrothment exists in consequence of the occurrence of sexual intercourse between those of a marriageable age, is no longer practical as far as betrothments subject to the decree *Ne Temere* are concerned; but is of importance only in the case of betrothments that are not subject to the decree, or which took place before Easter 1908.

Scholion. Various solemnities were observed in the *Roman law*, but were not regarded as essential. It was usual to celebrate the betrothal in the *forum* before witnesses, who were called *sponsores*. At a later date, the omission of these was supplied by the use of sponsal tablets or registers. The ring was given together with money to ratify the contract, and also the kiss. LAFOURCADE, o. c., p. 68 s. and 85.

The ancient law.

In the ancient *German law* certain formalities were also employed. These are described by COLIN, o. c., p. 85 ss.

For the *popular practices* of the Middle ages, see COLIN, o. c., p. 143 s. LAFOURCADE (o. c., p. 184) observes that the use of a *written document* was ordered by Louis XIII, of France, in the celebration of betrothals, not as a ceremony, but for purposes of proof. The present day practices observed in those places where formal betrothals commonly take place, will be found in ESCARD, l. c.

ARTICLE 3. The Subject, or Contracting Parties.

For betrothment, the contracting parties must have :

1. *The use of reason*, together with sufficient discernment to know, at least in a general way, that they are taking upon themselves the obligation of marrying; without this, they are incapable of consenting to a future marriage.

10.
The contracting parties.

2. *The age of seven years.*

3. *Ability to marry* at some future time.

The *first requisite* is wanting in lunatics and maniacs, unless they enter into the contract during some lucid interval. It is not necessarily wanting in the case of the deaf or dumb, nor, considering the modern method of instruction, in the case of deaf-mutes, even if they be at the same time blind. Cf. cc. 23-25, X, IV, 1.

1. Cap. unic., in VI^o, IV, 1.

2. WERNZ, o. c., IV, n. 161, note (113).

With regard to the *second requisite*, children, who are under the age of seven years, but in whom precocity supplies the deficiency of age, may have sufficient use of reason to be capable of betrothing themselves, as far as the natural law is concerned; but they appear to be incapacitated by the ecclesiastical law, in consequence of the legal presumption of the want of reason. In opposition to SANTI (o. c., L. IV, tit. II, n. 4), we are of opinion that this is to be inferred from cc. 4, 5, 13, X, IV, 2, and from the cap. unic. in VI^o, IV, 2 (1).

The *third requisite* will be explained in Chapter III, where we shall treat of the impediments of betrothment.

11.
*Betrothment
of those under
the age of
puberty.*

Note. Those below the age of puberty are not in consequence of that rendered incapable of betrothment, either by the natural law, since it is a question of a promise of *future* marriage, or by the canon law, as is clear from the whole of Book IV Decret., tit. 2, and from VI Decret., IV, 2. Nevertheless, betrothment before the age of puberty, though valid, is to be carefully discouraged, and persons below that age should not be permitted to contract it. Such betrothments are, in accordance with the provisions of the canon law, rescindible, as we shall point out below, in n. 24.

ARTICLE 4. The Adjuncts of Betrothment.

A. An Oath.

12.
*The effect of
an oath on
betrothment.*

The accession of an oath to valid betrothment adds to the obligation of justice a further obligation of *religion*. This obligation continues in force as long as the betrothment itself, and ceases with it. An oath does not make valid (2) a betrothment that is otherwise invalid, as, for instance, through the omission of the prescribed form; and it would appear that the oath itself is invalid, when employed in such a case (3).

1. « Si infantes ad invicem vel unus major septennio et alter minor sponsalia contraxerint... sponsalia hujusmodi quae ab initio erant nulla... publicae honestatis justitiam non inducunt ». Cf. also in the Roman law, L. 14, Dig., XXIII, and Ivo CARNUTENSIS, *Panormia*, VI, c. 13 (MIGNE, t. CLXI, c. 1246). See also ROCHE, o. c., p. 11 s.

2. Cf. LAFOURCADE, o. c., 166; DIGNANT, *De Virtute Religionis*, n. 256 s. Concerning the opinion ascribed to Ivo Carnutensis, that *sponsalia jurata* have the force of marriage, cf. ESMEIN, o. c., I, p. 140 ss. See also what is said under n. 14, note 2.

3. Cf. VAN DEN ACKER, o. c., p. 13 s. Cf. in the contrary sense WOUTERS, o. c., p. 31 ss.

B. A condition.

Leaving the fuller explanation of this matter and of its principles to n. 85 ss., the following will suffice for the present :

Betrothals contracted under a condition that possesses a *dissolving force*, are valid and produce their proper effects ; but cease to exist as soon as the imposed condition has been realised.

Betrothment entered into under a *suspensive* condition *de futuro* :
 a) *impossible, or repugnant to the substance of the contract*, whether in its sponsalitial or matrimonial aspect, is invalid, if such a condition was seriously imposed ; b) *possible, and not repugnant to the substance of the contract*, then, even though the condition be of an immoral nature, the betrothment is suspended until the condition is realised ; subsequently, unless invalidated by a provision of the positive law, the contract at once comes into force, even, it would seem, if one party or the other had illicitly revoked consent before the realisation of the condition ⁽¹⁾.

As long as the contract is suspended, the *impediment of public decency* also remains in a state of suspense ; thus a marriage contracted by the man with the sister of his betrothed before the fulfilment of the suspensive condition, would be valid ⁽²⁾. Nevertheless, the *prohibition* of marrying another person in the meantime remains, since one is bound to await the fulfilment of the condition, excepting only the case where that condition is an immoral one ⁽³⁾.

C. The Copula.

Before the Council of Trent, sexual intercourse, following on betrothment duly contracted, involved actual marriage *coram foro externo* by a presumption *iuris et de jure*, i. e. a presumption that did not admit of proof to the contrary ⁽⁴⁾.

14.
The effect of
an imposed
condition :
when of a
dissolving
force,

when of a
suspensive
force.

14.
Intervention
of the copula
in the ancient
law involved
a presumption
of marriage.

1. Cf. WERNZ, o. c., IV, 103 and 301 ; LEHMKUHL, *Theol. mor.*, ed. 9, 1898, II, n. 661 ; contra DE BECKER. *De Matrim.*, p. 79 s.

2. Cap. unic., in VI^o, IV, 1.

3. When the nature of the imposed condition, or its suspensive or invalidating force is doubtful, the presumption must be in favour of liberty, i. e. of nullity ; but, on the other hand, where marriage is concerned, the validity of the act must be maintained.

4. Cf. the decree of Alexander III, IV Decr., I, c. 13 *Veniens*, and especially the decree of Gregory IX, same title, c. 30 : « Is qui fidem dedit M. mulieri super

In other words, sexual intercourse between the betrothed was regarded *in foro externo* ⁽¹⁾ as a conjugal act, and accordingly, in the eyes of the Church, involved matrimonial consent, and constituted the contract of marriage. This was so much the case, that it was useless to oppose to this presumption the fact that all thought of marriage was wanting, and that the intercourse had been merely an act of fornication, or even the result of violence ⁽²⁾.

matrimonio contrahendo, carnali copula subsecuta, si in facie Ecelesiae ducat aliam et cognoscat, ad primam redire tenetur : quia licet praesumptum primum matrimonium videatur, contra praesumptionem tamen hujusmodi *non est probatio admittenda*. Ex quo sequitur quod nec verum nec aliquod censetur matrimonium quod de facto est postmodum subsecutum ». — Leo XIII, in his Constitution *Consensus mutuus*, of which we shall speak later, bears witness to the same, and says that the Roman Pontiffs « in hac juris praesumptione tantum roboris inesse voluerunt, ut firmum ipsa statueret sanciretque jus, nec probationem contrariam ullam admitteret », except, of course, a direct and quite evident proof.

1. *In foro interno* this presumption gave way to the actual truth, and in conscience the presumed marriage was to be held valid or invalid, just as at present, according as the betrothed had had carnal intercourse with conjugal intent, or not. This opposition between the *forum internum* and the *forum externum* naturally gave rise to conflicting claims, and resulted in a state of affairs in which a man was compelled, under pain of excommunication, to live with a woman who was not his actual wife, and to leave her to whom he was united by a bond that was valid in conscience.

2. ESMEIN (o. c., t. I, p. 142 ss.) is of opinion, that the discipline, in virtue of which betrothment, followed by sexual intercourse, passed by law into marriage, was introduced under the influence of the *Copulatheoria*, which formerly found favour with many doctors, inasmuch as, according to the common formula, *conjugium desponsatione initiatur et commixtione perficitur*, that is to say, the *copula*, taken by itself, and without any reference to the intention with which it was effected, added to the betrothal (*matrimonium initiatum*) an element that completed the marriage ; in this way it would be understood that the absence of conjugal intent did not invalidate the marriage. Cf. WATKINS, o. c., p. 133 s.

But leaving its fuller treatment to a later page, and setting aside for the present the intricate question of *copulatheoria* as far as it was accepted in law, the interpretation of the discipline given in the text, seems more fitting and obvious, that is to say, marriage, in the case indicated, was supposed to be constituted not by the *copula* as such, but inasmuch as it was presumed to manifest conjugal intent and consent.

LAFORCADE (o. c., p. 170 ss.) suggests that the said presumption was enjoined in order to meet the fraudulent conduct of those who, after being united in clandestine marriage and living together, as man and wife, wished to dissolve the union on the plea that they had given, not matrimonial, but merely sponsalial consent.

Presumptions of this kind were not unknown even in the Roman law,

From the time of the Council of Trent, which invalidated clandestine marriages, and made it a condition of validity that consent should be given in the presence of the parish priest and two witnesses, these presumed marriages ⁽¹⁾ have been thereby abrogated ⁽²⁾ *for all those places in*

many of the provisions of which the Church has appropriated. Thus SEHLING, *Unterscheidung*, p. 14-16, shows how, in the Roman law, from the taking of a woman into the home of her husband, matrimonial consent and actual marriage were presumed. Moreover, in ESMEIN, (o. c., t. I, p. 103) *Novella* 74 is quoted, according to which betrothment passed by carnal intercourse into marriage. Cf. also LAFOURCADE, o. c., p. 73 and 96.

It is interesting also to note that a similar discipline still exists in the civil law of Sweden and Scotland, as LAFOURCADE relates (o. c., p. 220 and 227): « Lorsque les fiançailles ont été suivies de cohabitation, la *copula carnalis* produit des effets analogues à ceux qu'elle engendrait dans l'ancienne théorie des *matrimonia praesumpta*. Elle forme un mariage imparfait, irrégulier, qui ne peut être rompu que s'il existe une cause légitime de divorce. Le mariage doit être célébré; si le fiancé s'y refuse, sa fiancée est déclarée son épouse légitime et jouit sur les biens de son mari de tous les droits que lui assure la loi ». Cf. NYSTRÖM, o. c., p. 245 s.

1. For the meaning of *presumed* marriage, see below n. 92.

2. Leo XIII clearly teaches in his Constitution, that the Council of Trent abolished *matrimonia praesumpta* for those places in which the decree *Tametsi* had force: « Deinde vero matrimonia clandestina... quum Concilium Tridentinum irrita infectaque esse jussisset, jus illud priscum, ut erat necesse, valere desiit ubicunque promulgata est vel moribus usuque recepta Tridentina lex ».

And, in truth, the *copula* taken by itself, though following on betrothment, does not necessarily signify matrimonial intent and consent, since it may take place with quite a different intention, but affords a mere presumption of consent, and so, even if the parish priest and the two witnesses were present, it would not imply consent given in the form required by the Council of Trent. We must accordingly reject the fantastic hypothesis of Sanchez, to the effect that the *copula* following upon betrothment contracted *in facie Ecclesiae*, and taking place in the presence of the parish priest and witnesses, constituted a valid *matrimonium praesumptum* even under the Tridentine discipline: « Quando, tam sponsalia de futuro quam copula sunt coram eodem paroco et testibus, dicendum est jus antiquum manere illaesum, atque ita transire in matrimonium verum quidem, si animo conjugali, praesumptum vero, quando fornicario haberetur copula adeo ut probata copula et sponsalibus praesumeret Ecclesia matrimonium cogereque ad illud, sicut ante Tridentinum cogebat ». O. c., III, Disp. 40, n. 7. Cf. also ESMEIN, o. c., t. II, p. 210 s.

Whether other kinds of *matrimonium praesumptum* were abolished by the Council of Trent for places subject to it, cf. below, n. 92, where we treat of *matrimonia praesumpta*.

which the chapter *Tametsi* is in force, the ancient law of the Decretals being preserved for places not subject to the Tridentine decree.

but no longer under the existing discipline. Until a very recent date, therefore, a legal presumption, *juris et de jure*, of marriage, arising from the *copula* of betrothed parties, still remained in force for those places and, for those places only, in which marriage could be validly contracted without the Tridentine form ⁽¹⁾.

But, on the 15th of February 1892, Leo XIII by the Constitution *Consensus mutuus*, ⁽²⁾ abolished that ancient law, and ordained that it should be held as abolished and abrogated, just as if it had never been in existence, decreeing that « henceforth in those places in which clandestine marriages are regarded as valid, all ecclesiastical judges who have cognizance of such matrimonial causes should forthwith cease to treat the intervention of carnal intercourse between betrothed persons as a presumption (*juris et de jure*) of the marriage contract, and that they should not acknowledge or declare such union to be lawful marriage » ⁽³⁾.

Nowhere, therefore, under the existing discipline is marriage brought into being, by a legal presumption *juris et de jure* due to the *copula* follow-

1. Leo XIII confirms this in the above mentioned Constitution, where he says: « Quibus autem illa (lex Tridentina) locis non viget, in iis semper Apostolicae Sedis judicium fuit, canones (Decretalium)... ratos atque firmos permansisse ».

2. *Collection S. C. de P. F.*, n. 1279. Concerning the interpretation of this Constitution WERNZ, (o. c., n. 104, note 114, cf. n. 29, note 12) warns us that the following points must be borne in mind: 1. « Cavendum est ne novum jus a Leone XIII constitutum etiam extendatur ad alias praeumptiones juris, (sive simplicis sive) juris et de jure, in causis matrimonialibus ». 2. Although the Constitution *Consensus mutuus* has not an express and formal clause giving it a retrospective force, nevertheless it appears that it is to be applied to all causes brought before an ecclesiastical court after 15 Feb. 1892. For the Roman Pontiff decrees that all contrary sanctions of the law whatsoever are to be held as radically abrogated and obsolete, « ac si nunquam prodissent ».

3. The Sovereign Pontiff was moved to this, both by the many inconveniences that arose from the conflict between the *forum externum* and the *forum internum*, and by the following consideration, as given in the Constitution itself: « plures Episcopi ex iis regionibus, in quibus matrimonia clandestina contra fas quidem inita, sed tamen valida judicantur, haud ita primum rogati quid populus ea de re sentire videretur, plane retulerunt canonicam de conjugiiis praesumptis disciplinam passim exolevisse desuetudine atque oblivione deletam, propterea vix aut ne vix quidem contingere ut copula inter sponsos affectu maritali et non fornicario habeatur: eamque non matrimonii legitimi usum sed fornicationis peccatum communi hominum opinione existimari; imo vix persuaderi populo posse, sponsalia de futuro per conjunctionem carnalem in matrimonium transire ».

ing on betrothment, whether the marriage be subject to the Decree *Ne temere* (1), or exempt from it.

The only difference is that a marriage subject to the decree cannot be contracted *per copulam*, (so that the « *praesumptio juris* » alone is no longer applicable), while a marriage exempt from the decree may be valid owing to the *copula*, but only where such carnal intercourse took place with conjugal intent.

D. Penalties, pledges, presents.

Sometimes a penalty is agreed upon against the party that draws back from the betrothment. Sometimes also a deposit either of real or personal property is mutually given as a sign of the betrothment and as a pledge of faithfully keeping the promise. Frequently presents are given, especially by the prospective bridegroom, as a mark of love and good will. Hence :

1. **Presents**, if they are of little relative value, are regarded as given absolutely, and there is no necessity to return them under any hypothesis, though as a rule they are given back on the dissolution of the betrothment. If they are of a more costly nature, they are considered as given under an implied condition of marrying, and after the marriage they are kept by the recipient. If the marriage does not take place, they must be returned by the respective parties, but when one party has unjustly drawn back from the contract, they may sometimes be retained by the injured party by way of compensation.

15.
When it is
necessary to
return

betrothal pre-
sents,

2. **Pledges** or deposits (2) may be demanded back after the marriage has taken place. If the betrothment has been broken, such pledges or deposits must be returned by the party unjustly defaulting, and they may be retained by the other party. In case of just cause for withdrawing from the contract they must be returned on both sides.

pledges.

3. With regard to **penalties** a difference of opinion exists. Undoubtedly a stipulated penalty does not hold good against one who *justly* withdraws from the contract, but it is doubtful if it has any binding force against one who withdraws *unjustly*.

16.
Whether a
stipulated pe-
nalty binds
one who
withdraws
justly,
or unjustly.

The negative opinion is favoured in no obscure manner by c. 29, X, IV, 1;

1. The provisions of the Decree *Ne temere*, of which we have already spoken, have replaced those of the Council of Trent, and will be more fully treated later.

2. Foremost among the pledges (*arrhae*) must be reckoned the betrothal or engagement ring, the giving of which was called *subarrhatio*. Thus c. 3, C. XXX, 5: « Postquam arrhis sponsam sibi sponsus per digitum fidei a se annulo insignitum desponderit ». It was customary, however, to give as pledges other things besides the ring, as is clear from MARTÈNE, o. c., I, II, p. 2^a, p. 640 s., where he gives the prescribed rubric: « Sacerdos benedicit anulum cum arrhis ». Cf. p. 616, also LAFOURCADE, o. c., p. 89 s.; GLASSON, o. c., p. 159.

for in this canon Gregory IX decrees that the stipulated penalty cannot be exacted from one who breaks his betrothment. He is there speaking, indeed, of betrothments that are invalid owing to defect of age, but the reason adduced affects any imposition of a penalty : « cum itaque libera matrimonia esse debeant, et ideo talis stipulatio propter poenae interpositionem sit merito improbanda ».

Moreover, the Roman law (L. 19, Dig., XLV, 1), to which the canon law for the most part conforms, unless there is proof to the contrary, rejects every stipulation of a penalty made by private individuals. The analogy of pledges (*arrhae*) does not hold good ; these are permissible, since in their case there is less reason to fear any hurtful excess, inasmuch as they are given in the present, while penalties apply to the future (1). Besides, in questions of fact the inference *a pari* is not valid (2).

Now if these arguments do not conclusively prove the opinion that denies any binding force to penalties of this kind, they at least render it extremely probable ; and in the face of this probability one who has unjustly defaulted cannot be compelled to pay the stipulated penalty, though the other party, taking advantage of the doubt, may demand payment and retain possession of the same.

CHAPTER II.

THE EFFECTS OF BETROTHMENT.

Betrothment entails :

17.
Effects of
betrothment.

1. A *diriment impediment of public decency*, which invalidates marriage with the blood relations of the respective parties in the first degree. Observe that this impediment remains even *after the dissolution of the betrothment*, but that it does not arise except from a betrothment that is valid and absolute (3). Cf. below, n. 308 ss., where we treat more fully of the impediment of public decency.

1. It might be objected that in the case of pledges (*arrhae*), one could stipulate for the immediate delivery of a part of the pledge, and for the subsequent doubling or quadrupling of that part. But cf. WERNZ, o. c., IV, n. 108 ; LAFOURCADE, o. c., p. 87-88 and 94 ; ROCHE, o. c., p. 21-24.

2. Cf. for the negative opinion, SANTI, l. c., n. 28 et seq., WERNZ, o. c., IV, n. 99, sub vi ; and for the opposite opinion, SCHMALZGRUEBER, in l. IV *Decr.*, tit. I, n. 138-148, and GASPARRI, o. c., I, n. 59-61.

3. According to *cap. unic. in VIo, IV, 1*, absolute betrothment, even though invalid for some reason other than defect of consent, entailed the impediment of public decency, and, according to the reckoning of Innocent III (8, X, IV, 14),

2. *An impedient impediment*, prohibiting marriage with any other person, as long as the valid betrothal exists.

3. *A threefold obligation* :

a/ A grave obligation of justice *to marry* the betrothed person ⁽¹⁾ *at the proper time* : that is to say, at the time fixed upon by the contracting parties, or, if no such date was fixed in advance, then at the time determined by use and custom, or at a time appointed by the ecclesiastical judge ⁽²⁾.

This is an *obligation of justice*, since betrothment constitutes a bilateral contract, in which a strict right is given in virtue of the mutual consent ; the obligation is *grave*, owing to the nature of the interests involved.

b/ An obligation, resting on the above, of *keeping the sponsalial faith*, that is to say, of maintaining a mutual loving intercourse according to custom and the circumstances of the case, and of refraining from all flirtation with a third party that might carry with it even an appearance of matrimonial purport.

c/ An obligation, likewise resting on the first-named, that the parties *should not render themselves unfit for marriage*, e. g., through impotency ; and again, that they should not voluntarily contract

up to the fourth degree. The Council of Trent, however, admitted the impediment of public decency in the case of valid betrothment alone, and restricted it to the first degree. Cf. Sess. XXIV, cap. 3, *De Reformatione matrimonii*.

1. *Collat. Brug.*, t. XI, p. 602, and what we have said above in 4, where we observe that the *code Napoléon* recognises no binding force in betrothment, according to the established practice ; nay more, promises of marriage are held to be null in law, as interfering with freedom of marriage. Damages may, however, be claimed under articles 1382 and 1383, not on account of the breach of promise, which the law permits, but in consequence of the misdemeanour or quasi-misdemeanour, that is to say, deceit or other like wrong. Cf. PLANIOL, o. c., n. 788 s. ; LAFOURCADE, o. c., p. 199-215, compared with p. 231 ss. This author gives on page 231 and following pages the various legal enactments on this head, and in particular the English law, which recognises in betrothment the obligatory force of a contract, but does not permit that the betrothed parties should be compelled to marry, and the new German law introduced in 1900. Cf. also SCHERER, o. c., par. 110, p. 140 ss. ; GLASSON, o. c., p. 270 s. ; *Rev. eccl. de Metz*, 1900, p. 25 s. ; CRÉTINON, l. c., p. 160 s.

2. *Collat. Brug.*, t. XI, p. 693 ; n. 2, above, in note. Cf. MARTÈNE, o. c., l. I, P. 2, p. 632, 630 and 643, whence it appears that formerly there was an interval of forty days between betrothment and marriage. Cf. also LAFOURCADE, o. c., p. 191 et seq.

any notable defect that would make them in a marked degree less desirable as husband or wife. The reason of this lies in the fact, that consent to a future marriage, implies an agreement on both sides, not to hinder the fulfilment of the promise by voluntarily placing any obstacle in the way of it. In other words betrothment gives, not indeed a *jus in re*, but a *jus ad rem* over the respective bodies of the contracting parties; that is to say, a right to the *jus in re*, or a right to the future use of the body. This implies a right that the said body should not be rendered unfit, or notably less fit, for conjugal requirements.

The obligations which we have just-described, and the impediment arising from betrothment belong to the *natural law*; the *canon* or *ecclesiastical law* adds thereto the impediment of public decency, and sanctions the prohibitive impediment as well as the obligation of the betrothed parties to marry one another, that already existed in the natural law.

18.
*Liability of
one who un-
justly de-
faults.*

Note. 1. Even if for grave reasons it is not desirable to force on the marriage, those who unjustly default, and refuse to keep their promise, are bound to indemnify the injured party for the loss inflicted. Moreover, though the party unjustly forsaken, should suffer no detriment in consequence, that party may, even by legal proceedings in the ecclesiastical court, exact compensation from the other as a penalty for broken faith and satisfaction for the wrong done. Cf. *infra*, n. 34.

2. We have confined ourselves here to the obligation of marriage as such, without taking into consideration the various circumstances that may accompany it. Certain circumstances may, indeed, give rise to an obligation of marrying, especially carnal intercourse, whether resulting in pregnancy or not, whether occurring under a promise of marriage or not. But these questions belong rather to a treatise *de Justitia*, where the question of restitution for injury to chastity and honour finds its proper place (¹). We have spoken above (n. 2) of the obligation arising from a simple unilateral promise.

1. The following is a summary of the teaching on this head: The *copula* alone, where it does not imply betrothment (n. 6), does not induce an obligation of marriage, not even when it has been effected by violence. It is sufficient in such a

Corollary. From what has been said a solution may be found to the much debated question, whether *betrothed parties by criminal intercourse with a third person incur the specific guilt of injustice against the other party to the betrothment, and are bound to declare the same in confession.* In solving this doubt some maintain that the betrothed, man and woman alike, are guilty of grave injustice ; others hold the woman alone to be so guilty ; while others, again, think that both parties are probably at least to be excused from grave injustice.

19.
Betrothed
parties guilty
of criminal
intercourse
with a third
person sin
against jus-
tice.

We consider that the first opinion ought to be preferred, and that *either party guilty of fornication, is guilty also of grave injustice* (1).

As a matter of fact the sponsalital promise carries with it not only an obligation of marrying, but also a further obligation, implied therein, of not rendering one's body unfit or less fit for conjugal use ; but fornication undoubtedly has this effect, and consequently constitutes a grave violation of the engagement entered into by the betrothed (2).

case that the seducer make reparation in some other way for the injury inflicted, e. g., by giving a dowry, according to the old saying : *Duc vel dota.*

If the *copula* results in *pregnancy*, there may then arise an obligation of *affection* to marry for the sake of the child, in order to render it legitimate.

If a *promise of marriage* simply is added to the *copula*, it will be considered, according to the intention of him who gave it, as binding *in justice* (cf. n. 2). If the *copula* was permitted *in consequence* of the promise of marriage, then, provided the promise was a *serious* one, there is an obligation in justice to marry, though the contract was made with an immoral condition or for an immoral object ; if the promise was *fictitious*, then, as a rule, the party who made the promise is under an obligation to marry, not in virtue of his promise, but in consequence of the injury inflicted, which he cannot otherwise repair. Cf. *Collat. Brug.*, t. II, p. 615 ss.

As regards the cessation of the obligation : note in the first place, that an obligation of affection more easily ceases than one of justice; secondly, that, as a rule, an obligation of justice is extinguished by those causes that put an end to the sponsalital obligation, according to what we shall have to say in chapter IV ; thirdly, that where the obligation remains, it is scarcely ever to be urged against an unwilling and recalcitrant party, but that recourse should rather be had to some amicable arrangement, as in the case of betrothment. See n. 34.

1. We mean fornication taken by itself, and abstracting from any amorous intercourse that went before, as if with a view to marriage ; though, of course, this latter would also be a breach of sponsalital faith, according to what we have said above.

2. That sponsalital faith is violated by fornication, is corroborated by c. 25,

It would certainly appear that a greater injustice is done to the man by the criminal misconduct of his *fiancée*, than to her by a similar act on the part of the man ; nevertheless it seems that we cannot deny the absolute gravity of the injury in either case, at all events, where families of decent condition are concerned ⁽¹⁾. The gravity of the injury is evident from the fact that, as a rule, an honest girl is seriously offended, when she discovers that her betrothed has been guilty of such a fault ; and also from the consideration that ordinarily the betrothment is thereby rendered dissoluble, at the discretion of the innocent party ⁽²⁾.

From what has been said we may reasonably conclude that the more rigorous opinion alone is *intrinsically* probable, and consequently, looking at the matter objectively, betrothed persons, who have committed fornication with a third party, are bound to make known in confession the circumstance of their betrothal ; and

X, II, tit. 24, where Innocent III decrees : « Si quis juraverit se ducturum aliquam in uxorem, non potest ei fornicationem opponere praecedentem, sed subsequentem, ut illam non ducat in uxorem ; quia in illo juramento talis debet conditio subintelligi : *si videlicet illa* (sponsa) *contra regulam desponsationis non venerit*. » Cf. c. 22, X, IV, 1 ; cf. also LAFOURCADE, o. c., p. 41 and 72, where he sets forth the provisions of the ancient German law against unfaithful *fiancées* ; likewise L. 13 § 3, Dig. XLVIII, 5, where a *fiancée* is declared guilty of adultery, because it is lawful to violate neither marriage nor the hope of marriage, (*nec matrimonium nec spem matrimonii*).

1. If the betrothed parties know one another to be of immoral life, and care little for their mutual good name, a fresh act of fornication will not greatly distress them, and if the man, or even the woman, should be guilty of such misconduct, they will hold the injury as little or nought.

2. This more rigorous opinion is favoured by many writers ; the older are quoted and followed by the SALMANTICENSES, *Cursus theol. moral.* tr. IX, Cap. 1, n. 11. Among the more recent may be mentioned BANGEN, *Instr. pract.*, I, p. 13 ; ROSSET, o. c., t. II, n. 957-964, and BALLERINI-PALMIERI, *Opus theol. mor.*, Prati, 1889-1893, t. VI, n. 148-163 ; the two last named have no hesitation in denying intrinsic probability to the opposite opinions ; BENEDICT XIV, *Instit.* 46, n. 19, defends the same opinion. Many modern theologians, as LEHMKUHL, o. c., t. II, n. 664 ; BUCCERONI, *Instit. theol. morales*, Romae, 1893, t. II, 948 ; GENICOT, *Theol. mor. instit.*, t. II, n. 444 ; NOLDIN, *De sexto Praecepto*, 1900, n. 19 ; MARC, *Instit. mor.*, t. I, n. 775 ; AERTNYS, *Theol. mor.*, 1890, t. II, n. 429 ; GASPARRI, o. c., n. 66, declare the matter doubtful, and so exempt penitents from the obligation of making known the circumstance : for the most part they refrain from discussing the reasons, and rely solely on extrinsic authority, especially on that of St Alphonsus, merely repeating his words or invoking his authority.

confessors ought to question them about it, as occasion offers. If, however, *anyone considers that the intrinsic improbability of the contrary opinion is not established*, he can adopt the more liberal opinion, and put it in practice, *relying upon its extrinsic probability*.

Should there be occasion to ascertain from a penitent if he is betrothed, this will present no great difficulty to the confessor, since in most cases the circumstance will declare itself spontaneously, in answer to other questions that have to be put in order to secure integrity of confession, or for the purpose of direction.

CHAPTER III.

IMPEDIMENTS OF BETROTHMENT.

I. Betrothment is **impeded** i. e., rendered *illicit*, especially by ^{20.} *Impediments that prohibit betrothment,*
the *reasonable refusal of parental consent*.

Explanation : a/ We do not say that it is always and everywhere unlawful to enter into betrothment *without asking parental consent*, (for herein regard must be had to the customs that prevail); but due reverence for parents demands that it should not be contracted *in opposition* to their reasonable wish (¹).

b/ If the dissent of the parents affects *the promised marriage itself*, then the betrothment is *invalid*, according to what we shall have to say under II, since there is then a prohibitive impediment to the marriage.

II. Betrothment is rendered **null** or **invalid** :

A. By want of the use of reason, or even of the presumed age ^{21.} *or render it null:*
of reason, viz. seven years, as we have seen above.

B. By any *matrimonial impediments* whatsoever, whether diriment or impedient, that are *of themselves perpetual* and *independent of the will of the contracting parties*, both those, from which a dispen-

1. Ivo Carnutensis describes the ancient law of the Church in *Panormia*, I, IV, c. 12, apud *Migne*, vol. 161, col. 1246. Cf. for the Roman law, LL. 11-13. Dig., XXIII, 1. Cf. LAFOURCADE, o. c., p. 58 ss.; see also what we say below n. 248 ss. concerning parental consent with respect to marriage; cf. also *Rev. eccl. de Liège*, III, p. 100 ss., where the duty of children towards their parents in this matter is most skilfully treated. Cf. in fine, the *Causa Milevitana*, 23 Dec. 1910, in the *Acta A. S.*, III, p. 76 ss.

sation cannot be given, or is not usually given, and also those, from which it is customary to grant a dispensation ; this holds good, even, it appears, if the betrothment is entered into *under a condition of obtaining a dispensation*.

Explanation. 1. The impediments are understood as existing at the moment when the betrothal is made. Of the case in which they supervene upon a contract already made, we shall speak below, n. 25.

2. We say : *of themselves perpetual and independent of the will of the contracting parties* ; because impediments which are *of a temporary nature*, so as to disappear spontaneously with the lapse of time, or which, if of themselves perpetual, may be removed at the will of the betrothed, do not affect the validity of the betrothment, provided, as we suppose, there is a tacit condition of marrying *after* the removal of the impediment. This is the case with the prohibited time, impuberty, a temporary vow of chastity, mixed religion and disparity of worship, where the non-catholic or infidel party is willing to embrace the faith.

3. The reason why betrothment is rendered null by a *prohibitive* impediment of marriage is that no one can validly promise that which is impossible or unlawful.

4. Among those causes which render marriage unlawful, and betrothment consequently null, may be reckoned an *inequality of condition* between the parties desiring to marry, so great and of such a kind, that the marriage cannot take place without grave dishonour to a whole family. If the inequality is not so excessive, the betrothment is not thereby annulled, though, if the inequality was unknown, it may be rendered subject to rescission, according to what we shall say below, n. 28.

5. It seems necessary to state that betrothment is null and void through the presence of a matrimonial impediment, subject to dispensation, even though it has been entered into *under a condition of obtaining a dispensation*.

in particular, betrothment, made with a marriage impediment, under a condition of obtaining a dispensation, is null, not by its nature,

Conditional betrothment of this kind is not, indeed, *by its nature* null. If we consider that alone, there is here, as in other betrothments with a suspensive condition, an obligation of awaiting the fulfilment of the condition, together with a prohibition of contracting marriage or a fresh betrothal with another party ; and

on the fulfilment of the condition, it forthwith becomes valid (¹).

But *from the positive will of the Church* it seems that such betrothment is null. This positive will of the Church is apparent in various Roman decisions given in the *N. R. th.*, IV, p. 582 ss. (²). There is also the authority of several authors, among whom may be mentioned, FEYE, *De Imp.*, n. 394; BALLERINI-PALMIERI, o.c., VI, p. 96 ss.; SANTI, *in tit. V*, n. 30 ss.; WERNZ, o. c., IV, n. 95 s.; DE BECKER, *De matr.*, p. 8 s.; *N. R. th.*, l. c., p. 571 ss., and the authors there adduced. GASPARRI holds the contrary opinion (o.c., n. 50 ss.), together with the Doctors quoted by FEYE.

but by the positive law of the Church.

SANTI (l. c.) remarks: « The Congregation acts thus, it appears, to remove as far as possible between relatives, those dubious and dangerous attachments made under the condition of obtaining dispensation later ».

Hence it follows, that those united in a betrothment such as we have been speaking of, have not contracted the impediment of public decency, and are free to pass on to other engagements, without being obliged to procure a dispensation or to wait for one (³). Nevertheless, as the fullest certainty is desirable in a matter of this kind, the betrothed, in such a case, must not be declared free from all obligation, and from the impediment of public decency, *without recourse being had to the Ordinary or to the Holy See*. The party forsaken, in consequence of the existing doubt, may press his or her claim against the party repudiating the contract.

1. It is to no purpose to object that the condition is an immoral one, as it leads to the extorting of a dispensation and so does violence to the law.

2. It is there a question of betrothment judged *before* a dispensation had been obtained; but this makes no difference, since it is declared, without any restriction, that the contract was altogether null, and induced no obligation, not even of applying for a dispensation, or awaiting the issue.

3. Cf. WERNZ, o. c., IV, n. 95, note (54), where he remarks that the betrothed are bound to keep their promise by a certain sense of honour (*ex quadam honestate*), but not by any strict obligation.

CHAPTER IV.

THE DISSOLUTION OF BETROTHMENT.

22.
Difference
between dis-
solved and
dissoluble
betrothment.

Observation. Betrothment validly contracted is not indissoluble, but may be dissolved for various reasons (*), and in a two-fold manner: either 1. in such a way as to be *ipso facto dissolved*, and so straightway cease to exist; or 2. in such a way as to be *dissoluble* or *subject to rescission* at the will of one party, or of both.

In the first case it simply ceases to exist; in the second it continues to exist until the one party or the other, having the power to do so, cancels the contract. The party exercising this right to withdraw is not bound to marry, nor to refrain from marrying another.

In whatever way a betrothment, once validly contracted, is dissolved, the diriment impediment of public decency remains in force, and only the prohibitive impediment, prohibiting another marriage, together with the obligation of marrying the betrothed person, ceases to exist.

It should be noted also, that the causes dissolving betrothment likewise remove the *religious obligation* contracted by an *oath*, if such was added to the contract, since the accidental follows the principal. Cf. WERNZ, o. c., n. 109.

The causes
are:

Bearing in mind what has been said above, the following are the *principal causes* whereby betrothment is *dissolved* or rendered *dissoluble*.

23.
1. consent of
the betrothed;

I. Consent of the betrothed parties.

1. Betrothment is *dissolved* by the *free* and *mutual* consent of the parties (*), even if privately given, to the rescission of the contract; provided, however, that they are *of a marriageable age*. Those under that age, have no power to revoke their consent before attaining puberty, as will be presently noted, since the Church incapacitates them from doing so, lest they should rashly entangle themselves in successive promises of marriage.

2. Revocation of consent by *one* party renders betrothment

1. In the Greek Church betrothment induces a bond, which, though not indissoluble, is much stronger than in the Latin Church. Cf. VERING, o. c., p. 856 s.

2. C. 2, X, IV, 1.

dissoluble at the will of the other, since there is no obligation to keep faith with him who breaks his promise.

II. **Impuberty** of one or both of the contracting parties: Betroth-^{24.} *impuberty* ;
ment between those who are not of a marriageable age, or between one who is, and one who is not of that age, is valid indeed, but *dissoluble* at the will of the party subsequently attaining puberty (¹). That party, on reaching marriageable age is at liberty to renounce the betrothment within three days from the time that he became aware of his privilege (²), with the single exception, perhaps, of the case in which the contract has been confirmed by oath (³) by parties below the age of puberty, but very near to it. The law makes this provision, as we have seen, in view of the imperfect discretion of those under the age of puberty (⁴).

III. A supervening matrimonial impediment.

1. Betrothment is *dissolved* when a perpetual matrimonial impe-^{25.} *a superven-*
diment, whether diriment or impedient, supervenes, and when *ing matrimo-*
this impediment is one which does not admit of dispensation, or *nial impedi-*
which, while capable of dispensation, has been contracted by both *ment* ;
parties. In this latter case it is held as equivalent to a mutual renunciation of the betrothment.

If an impediment that does not admit of dispensation has been contracted through the fault of one of the parties, and the betroth-

1. C. 7, X, IV, 2. Cf. supra, n. 11.

2. There is no reason to add, with the *Theol. Mechl.*, o. c., n. 4, « *modo inter eos (impuberes) non intervenerit copula carnalis* » ; and to appeal to cap. 8, of this title. If the *copula* occurred before the sponsalital contract, that is a proof that betrothment took place between those who had reached the state, if not the *years*, of puberty ; and so the privilege does not exist. If the *copula* was subsequent to the contract, then, with the attainment of physiological puberty, the time for using the privilege began. In the passage of the Decretals referred to, it is a question of *matrimonial* consent given before the years of puberty ; from which it is lawful to withdraw, on attaining that age, provided carnal intercourse has not intervened : because then it would be evident that puberty was present, and that the marriage would *ipso facto* exist.

3. Cf. WERNZ, o. c., n. 110, note (130).

4. For a like reason, namely on account of the absence of complete freedom, a betrothment entered into under the infliction of *grave*, or even of *slight fear*, is dissoluble, at all events *in foro interno*, provided the engagement was really made under the influence of that fear.

ment consequently dissolved, the party at fault is bound to make compensation for the injury inflicted.

2. Betrothment is *dissoluble* when the act of *one or other of the parties* gives rise to a matrimonial impediment, either temporary or perpetual. In that case the innocent party may either withdraw from the engagement, or insist on his right ; in the latter event the offending party is bound to procure a dispensation, if that can be done without any excessive detriment ; or if the impediment is of a temporary nature, he must keep his promise on the removal of the impediment.

This occurs especially when the man has been guilty of criminal misconduct with the sister of his *fiancée*, or with some blood-relation of hers within the second degree. The *fiancée* may then insist on the marriage, but on her side is freed from all obligation to marry. In such a case it would often be better to advise the girl to waive her right, and permit the man to marry her sister or other blood-relation with whom he has misconducted himself, especially if such should be enceinte. Cf. *Collat. Brug.*, t. XI, p. 641 ss.

but special attention must be given to the supervention of the impediment of a vow ;

3. Special attention must be given to the supervening on betrothment of the impediment arising from a **vow** ; that is to say, from a vow of perfection, or from the actual embracing of that state, which is considered as equivalent to a vow.

a/ If *both* parties take the vow, or choose the more perfect life, the betrothment is spontaneously *dissolved*, according to what we have already said under 1.

b/ If *one* party only takes the vow, or embraces the more perfect life, then the betrothment is *dissoluble* at the will of the other party, in accordance with the rule laid down above under 2 ; it would moreover appear that the betrothment is *dissolved* as often as either party has contracted a *perpetual* obligation, even though dispensable, to the more perfect life, as, for instance, when he (or she) makes a solemn, or even a simple profession in an approved congregation, or is promoted to sacred orders, or again takes a vow of perpetual chastity in the world, or binds himself by a perpetual vow to the religious life or to celibacy. It would appear that the special pre-eminence, which this impediment arising from a vow, possesses over all other matrimonial impediments in dissolving the

sponsalitial contract, is due to the well known preference that the Church shows for the more perfect life as compared with the married state. This preference is apparent also in the privilege conceded even to those who are married, before the actual consummation of the marriage (¹). If only a *temporary* obligation has been contracted, as for example by a vow for a limited period, by simply entering the religious state, or by receiving the tonsure or minor orders, the betrothment is not dissolved; consequently the party, on giving up the more perfect state, is bound, at the instance of the other party, to fulfil his (or her) promise of marriage, though, owing to the preference due to the more perfect life, on which he has entered, he is not bound to give it up in order to marry, or to seek a dispensation for that purpose.

IV. Another marriage or a fresh betrothment.

1. A fresh *betrothment* (²), if attempted by both parties, *dissolves* the former contract. If, however, it is attempted by one party only, then the existing contract is rendered *dissoluble* at the will of the other party.

26.
4. another
marriage or a
fresh betroth-
ment;

2. The supervention of an *invalid marriage* dissolves the betrothment, or renders it dissoluble, according as marriage has been contracted by both parties or by one only, as stated above in 1.

A *valid* marriage certainly dissolves the betrothment, if *both* of the parties marry. If, however, only *one* of them should marry, it is a moot-point whether the betrothment is thereby *dissolved*, or merely rendered *dissoluble*, so that, if the innocent party does not waive his claim, the offending party remains bound by the previous obligation to marry after the dissolution of the existing marriage.

Theoretically speaking, though authors are not agreed on this point (³), it cannot be admitted that the contract is dissolved, and consequently the obligation must be maintained. In practice,

1. See below n. 133.

2. A fresh betrothment, contracted while the former is still in force, is certainly invalid.

3. Cf. WERNZ, o. c., IV, n. 114, note (140), where he contends that the betrothment is dissolved, and that all obligation ceases, in opposition to SANTI, in I, IV, tit. I, n. 50, and *Anal. eccl.*, 1901, p. 144 s.

however, the obligation may for the most part be ignored, at all events when the marriage is not quickly terminated, since under the circumstances it is hardly likely to be insisted upon by the party forsaken.

V. Flirting with a third party.

27.
5. *flirting
with a third
party ;*

Since flirtation of this kind constitutes a breach of faith, and implies a renunciation of the contract, betrothment is thereby rendered *dissoluble* at the will of the other party, in accordance with what we have said above.

We are speaking here of the courting, of a third person *with a view to marriage*, or of such courting as is to all appearance carried on with a view to marriage ; for this latter is equally injurious to the other party. Moreover such conduct will easily give grounds for uneasiness as to future conjugal fidelity, of which we shall speak under VI.

VI. Subsequent change or discovery of defect.

28.
6. *subsequent
change or dis-
covery of de-
fect ;*

We are to be understood as speaking of some *notable* change or defect.

Revocability of the betrothment by the one party on account of a notable *change* in the other arises from the fact, that the respective parties are rightly considered to have promised to marry one who is morally identical with the person with whom the sponsalial contract was made.

That the *discovery of a grave defect*, even of one that had not been fraudulently concealed, brings with it the power to *dissolve* the betrothment, arises from the provisional nature of the sponsalial contract, and from the consideration that is due to the liberty and stability of marriage. Hence this reason for dissolving the contract especially applies to a defect that forebodes an unhappy issue to the marriage, or makes conjugal fidelity suspect.

Examples.

Such are the following cases :

1. If in one of the parties there should supervene, or be brought to light : heresy, the commission of a crime, ill fame, loss of virginity, sterility consequent on a surgical operation, deformity, inaptitude for bearing the burdens of the married state, poverty, and other like defects.

2. A betrothment may also be rendered dissoluble, at least in

conscience, if in the mutual intercourse of the parties it becomes evident, without the detection of any special fault, that there is a contrariety of disposition, such as to give good reason to fear that the marriage will turn out an unhappy one (¹).

3. *Fornication* with a third person, even apart from any flirtation, which may perchance have preceded it, and of which we have spoken above (V.), constitutes a cause of dissolubility on three grounds : firstly, it induces a change, which in the case of either of the betrothed is regarded as grave, at least among decent people ; secondly, it gives rise to a suspicion of subsequent conjugal infidelity ; while, in the third place, as we have said above (n. 19), it is tantamount to an implicit renunciation of the contract, consequent on the neglect of the obligation contained therein of mutually preserving bodily integrity (²).

Immodest touches indulged in with a third person do not of themselves constitute a notable defect, though, if frequent and unrestrained, they may give ground for well founded doubt as to future conjugal fidelity, and may accordingly under this head render the betrothment dissoluble at the will of the other party.

Note. a/ If one of the parties should unexpectedly attain to greater wealth or higher social position, or should have the offer of a more desirable engagement, there are not wanting authors (³) who hold as probable the opinion that such a party might, though not without reproach, lawfully withdraw from the previous contract on the ground that the condition in life of the other party is

1. The apprehension of an unhappy issue to the marriage does not render the betrothment subject to rescission, and cannot extinguish the obligation of marrying, except in so far as it rests on some objective basis, on some actual defect or real contrariety of disposition. This is not the case, if the apprehension arises from the purely subjective disinclination of one of the parties to marry. Under such circumstances the betrothment holds good together with its obligation, though as a rule this is not to be urged, as we shall observe under n. 34.

2. If the act of fornication took place between one of the betrothed and *a blood-relation of the other* within the second degree, there arises a fourth ground of dissolubility in favour of the innocent party, in accordance with what we have said above under n. 25.

3. For example, PRUNER, *Lehrbuch der Pastoraltheologie*, Paderborn, 1904, I, n. 815 ; WERNZ, o. c., n. 116.

relatively lowered. It is difficult, however, to admit this, unless perhaps in quite exceptional circumstances, as, for instance, where owing to the change in the social position of the man, his betrothed would obviously be quite unequal to the discharge of the duties that would fall upon her as his wife.

b/ If the defect was known *before* the betrothment took place, it does not render the contract subject to rescission (¹). The same holds good if the contract was ratified after knowledge of the defect (²).

Scholion. With regard to the *obligation that the betrothed are under of mutually manifesting their hidden defects*, the following rules may be laid down :

1. As regards those defects that *do not bring any grave injury or disgrace* to the other party, but which would merely make the marriage less acceptable, without inflicting any serious injury, the betrothed are not bound in justice to reveal them ; for no one is required to make known his own defects merely to avoid giving displeasure to another, provided that this one is not liable to any serious injury in consequence of them. Such defects would be fornication in the past, not followed by pregnancy ; loss of vigour ; or a physical infirmity that is not of a contagious nature.

29.
The betrothed
are bound to
make known
to one another
occult defects
that entail
serious dis-
grace or in-
jury,

2. *Theoretically speaking*, those intending to marry are respectively bound either to abstain from doing so, or to make known any occult defects that would entail *serious disgrace or injury* to the other party. « For, as in other contracts it is not lawful to pass off an article with some hidden defect to the injury of the other party, so in like manner it is unlawful to enter upon the sponsalial or matrimonial contract with an occult defect of an injurious nature » (³).

Pregnancy of the betrothed woman by some other man would be a defect of this kind, except in the case of people lost to all

x. The reason is because the other party is considered to have condoned the defect.

2. The ratification may be made in express words, or implicitly, v. gr., by a continuance or resumption of intercourse.

3. THEOL. MECHL., o. c., n. 8. It must be understood that we are speaking of such defects as do not destroy aptitude for marriage and its essential duties, otherwise it is evident that the marriage is absolutely forbidden.

sense of decency. Such also would be a contagious complaint, as syphilis, or even consumption.

We have said : theoretically speaking ; because, looking at the matter *in the concrete*, regard must be had to *prevailing customs and common opinion*, so that betrothed parties are not to be compelled to make known defects that general usage and opinion permit them to conceal, even though they be injurious to the other party. This especially holds good with regard to the pecuniary position of the parties, for it is a matter of common experience that their statements in this respect are not always to be trusted, and it is precisely for this reason that such careful inquiries are usually made ⁽¹⁾.

nevertheless
regard must
be had to
prevailing
customs.

Observe : a. Where there is no obligation of revealing defects, they may also be deliberately concealed, provided there is no positive deception of the other party.

b. It is most advantageous that any existing defects should be mutually known, and especially that there should be no concealment, as to pecuniary position, which might afterwards give rise to misunderstandings and disputes. There may even be an obligation of *charity* to make such a revelation, provided the matter is not such as to prejudice seriously the party making it, as, for instance, where it would result in the girl losing her good name, or having to remain unmarried ⁽²⁾.

VII. Lapse of time.

1. If a time has been fixed for the marriage :

a/ So as to *put an end to* the obligation in case of delay, the contract is *dissolved* if the delay has occurred through the fault of neither, or of both of the parties. If it has occurred through the fault of one party only, then the contract will be *dissoluble* at the will of the other party.

30.
7. Lapse of
time ;

b/ If a time has been fixed for the purpose of rendering the

1. We suppose, of course, that some limit is observed, and that the discrepancy between the actual and alleged state of affairs is not altogether disproportionate.

2. In Holland an act is in preparation providing for the compulsory medical examination of those intending to marry, and for the communication of the result to the respective parties. Cf. *Collat. Brug.*, t. XV, p. 19 s.; NYHOFF, o. c., p. 54 s.

obligation *more urgent*, then an involuntary delay leaves the contract untouched ; but a voluntary and notable delay renders it *dissoluble*, when such delay is made without just cause, and the other party presses for the fulfilment of the promise.

2. If no time has been fixed :

A delay notably in excess of that usual in the country concerned ⁽¹⁾, has the same effect as delaying beyond the time fixed for rendering the obligation more urgent. See 1, b, above.

Note. 1. From what has been said above, we may determine the validity and stability of a betrothment, when one of the parties goes away to a distant country.

2. Whether a time has been fixed for the purpose of putting an end to the obligation, or of rendering it more urgent, must be determined *in foro interno* according to the intention of the contracting parties. *In foro externo* it must be gathered from the words employed, or, if these leave the matter doubtful, from the attendant circumstances and from the motives that influenced the betrothed in arranging their marriage for such a date ⁽²⁾.

31.
8. dispensa-
tion.

VIII. Dispensation.

The Sovereign Pontiff has the power of *dissolving* the bond of betrothment, with its mutual obligations, and consequently of *removing the prohibition* to marry a third person, even in so far as this prohibition arises from the *natural law*.

A. Proof.

*Proof that the
Church has
power to dis-*

It is beyond contradiction that betrothment, like every other contract, produces mutual obligations and rights by virtue of the

1. In the Roman law, and in the ancient German law the delay could not exceed two years. Cf. LAFOURCADE, o. c., p. 191 s. ; ROCHE, o. c., p. 8 s.

2. SCHMALZGRUEBER, o. c., n. 196 s. : « Si verba sint ambigua... recurrendum ad causas et motiva ob quae terminus fuit assignatus. Nam si utraque pars, vel saltem illa quae cupit diem adjici, apprehendit sibi omnino expedire ut brevi sive cum hac sive cum alia persona matrimonium contrahat, quia vel difficile ipsi est diutius a nuptiis abstinere, vel alia offeruntur matrimonia commoda, quae postea frustra desiderabuntur, censebitur tempus adjunctum obligationi finiendae. At si adjicitur tempus non quia partibus per se incommodum est diutius abstinere a nuptiis, sed quia nuptias has apprehendunt ut sibi commodas, ideoque cupiunt eas cito perfici, ne quacumque ratione postea impediuntur, censebitur adjectum tempus obligationi intra illud tempus implendae » ; that is to say, for the purpose of rendering the obligation more urgent.

natural law, and that the common good requires that these rights and obligations should as a rule be respected.

*solves betroth-
ment by
dispensation.*

But we must not conclude from this that the contract can never be cancelled, and that the obligation arising from it can never be removed. As a matter of fact the natural law does not demand the indissolubility of betrothment : this contract, like so many others (¹), is on the contrary subject to dissolution. The contracting parties have the power to dissolve the contract under various circumstances, for a variety of reasons, and even without other reason than their mutual desire to do so. If this is not opposed to the natural law, neither is the dissolution occasionally pronounced for grave reasons by a higher authority opposed to that law. Nay more, the common good itself, the foundation of the natural law, requires that the stipulated obligation of which we are speaking should be capable of invalidation by the head of the social body.

We must, therefore, recognise that the Church possesses the power of dissolving betrothment in the case of the faithful (²). This power the Church exercises from time to time without hesitation, and therein we have a proof of its existence (³).

B. As regards *the actual exercise of this power* by the Church it is necessary to make the following restrictions. In the first place there must be a *grave reason*, even when the Pope dispenses personally ; secondly, the Bishops are not vested with this power ; finally, it is the practice of the Holy See to impose, in the rescript

*Observations
on the exer-
cise of this
power.*

1. We do not deny that there are contracts of a special nature, the indissolubility of which is demanded by the natural law. Such is the marriage contract, as we shall show later.

2. Our argument leads to the recognition of the same power in the State, in cases where the betrothment of non-Christians is concerned.

3. Thus, on 31 Jan. 1863, the S. C. C. replied in the case of Titius and Caia : « That the impediment was removed on condition that Titius paid, by way of dower, 600 ducats to Caia, and undertook to make good all losses, including the education of her child ». *Acta S. Sedis*, I, p. 242. In like manner, on 11 Sept. 1887, in answer to the question : Whether there was reason for removing the impediment *Nihil transeat*, the S. C. C. replied in the case : « In the affirmative, with a previous dispensation, after audience with the Holy Father ; and provided that the man is admonished to give, according to his means, to the betrothed and her child an equitable compensation, to be determined by the Archbishop (of Ostuni) ». LEITNER, *Lehrbuch*, p. 347.

dispensing from the impediment, an equitable compensation for the benefit of the party forsaken. If this *compensation* is not fixed by the Sacred Congregation of the Council, it rests with the Bishop to determine the amount, as in the case of 1887 (1).

CHAPTER V.

THE REGULATION OF BETROTHMENT.

ARTICLE 1. To whom the regulation of betrothment belongs.

32.
The regulation
of betroth-
ment between
christians
belongs to the
Church alone.

As betrothment is a preliminary preparation for marriage, its regulation belongs to the same authority as that of marriage itself. This regulation, as we shall afterwards show, belongs to the Church alone where christian marriage is concerned, while the State has the power of regulating the marriage of non-christians, and also of determining the civil effects of christian marriage (2).

The *legislative* power over betrothment is exercised by the *Sovereign Pontiff*, and by him *alone*, so that the *Bishops* have no power to set up impediments to betrothment; but to them it belongs to exercise a judiciary power as judges of the *forum externum*. As regards the *parish priest*, he is not a judge of the *forum externum*, but it is his office to examine cases of this kind for the purpose of duly referring them to the Bishop. He can, however, when the matter has been examined, and is not carried into court, declare the case settled, subject always to the decision of the Bishop (3).

ARTICLE 2. Duty of the parish priest, when a marriage is opposed on the ground of betrothment contracted with a third person.

I. The parish priest must inquire into :

33.
Opposition on
the ground of
betrothment.

1. The fact of the betrothment, alleged to have taken place, for

1. Concerning this Pontifical dispensation see also SCHMALZGRUEBER, o. c., n. 214; GIOVINE, o. c., I, consult. III, par. 61; FEYER, *De Imped.*, n. 556 et seq.; SCHERER, o. c., par. 110, not. 110; GASPARRI, o. c., I, n. 106-108; WERNZ, o. c., IV, n. 118; *Anal. eccles.*, 1899, p. 406 and 408.

2. The Code Napoléon, as we have already observed, ignores the existence of betrothment, and allows it no effect.

3. The exercise of jurisdiction in cases of betrothment, and the respective duties of the Bishop and parish priest, are treated at length by BANGEN, *Instr.* I, p. 58-62, 65, and 71-77; and more concisely by GIOVINE, o. c., I, *Consult.* XI, par. 187.

instance, between the young man and the plaintiff; and its validity.

2. He must see if it has been lawfully *dissolved*, or if it is *subject to rescission* at the will of the young man.

With regard to 1: The parish priest must not at once give credence to the plaintiff's statement, for such opposition is sometimes the outcome of ill-will and jealousy. On the other hand he must not, without preliminary investigation, dismiss the plaintiff, and set her claim aside, since, if her assertion is well founded, she is quite within her right.

1. The parish priest must examine into the validity of the alleged betrothment,

He ought to receive her with kindness and carefully examine her claim. At the same time he will prudently refrain from mentioning it to others, so as to avoid giving occasion for talk among the people, ill-natured comment, or disputes.

The examination into the fact of the betrothment will not offer any difficulty if it has taken place *under the new discipline*, and since Easter 1908. But the difficulty is greater when it is a question of betrothment *made before that date*.

In this case the parish priest will make it his business to learn from the lips of the plaintiff herself, if the alleged promise of marriage was real and reciprocal: as a preliminary, he will earnestly admonish her not to conceal the truth (¹). Moreover, he will take into consideration various circumstances that may help to clear the matter up. He will ask, for instance, if the couple have presented themselves before the parish priest; if they have already taken a house; if engagement rings have been given and received; and so forth (²).

If after all the matter still remains in doubt, he might, perhaps, take the evidence of one or two prudent witnesses, or even, if he can prudently do so, that of the young man himself.

With regard to 2: When once the validity of the betrothment has been established, it remains to be seen if it has been subsequently dissolved, either by mutual renunciation, or by some canonical cause; or if perchance it has become subject to rescission at the will of the man.

and its actual dissolution or possible dissolubility.

1. He will show her the gravity of the calumny, which may give rise to quarrels, loss, and scandal; and will tell her how great a sin it would be to hinder the marriage through malice. Cf. BANGEN, *Instr. pract.*, I, p. 71.

2. Cf. *Causa Milevitana*, 23 Dec. 1910, in *Acta A. S.*, III, p. 70 ss.

34.

2. After investigation: a/ in case of nullity or dissolution, as a rule, the parish priest may proceed as if nothing had happened;

II. After the investigation :

A. If it has been *shown* that there was *no* betrothment, or that it was *null*, the parish priest may ignore the objection to the marriage; and, as a rule ⁽¹⁾, proceed *on his own authority* with the publication of the banns, if they have still to be published, and with the celebration of the marriage.

The same holds good where it has been *proved* that the betrothment has been dissolved, or rendered dissoluble at the will of the man, supposing, of course, that there is no impediment of public decency ⁽²⁾.

b/ in doubt he must have recourse to the Ordinary;

B. If after examination it is apparent to the parish priest that the *betrothment*, or its *validity*, or its *dissolution*, or its *dissolubility* is doubtful, and that he cannot bring about an amicable arrangement, he must lay the case before the *Bishop*, and meanwhile suspend publication of the banns ⁽³⁾.

As we have already seen, the Bishop alone is judge in the *forum externum*; to him it belongs to settle difficulties judicially, and to solve those doubts that come within its scope, while the parish priest has only to examine the case.

It is necessary, therefore in such a case to await the sentence or declaration of the Ordinary ⁽⁴⁾. If he pronounces for the nullity

1. We say : *as a rule* ; because a/ it may happen that one ought first to seek the intervention of ecclesiastical authority, e. g. to avoid scandal, « in a case where the cause of the rupture is not public, and sufficiently well known, and the betrothment is commonly regarded as valid » SANTI, in l. IV, *Decr.*, tit. I, n. 69 ; b/ in like manner the parish priest could not proceed, if the opposing party had had recourse to the Bishop, and had obtained an inhibition.

2. In the case in which a betrothment, originally valid, has been dissolved, or has become rescindible at the will of the man, there will still be a marriage impediment between him and any blood-relation of his former *fiancée* in the first degree ; the impediment of public decency remaining, even after the dissolution of the betrothment, it is clear that it would be necessary to apply first for a dispensation.

3. Council of Trent, Sess. XXIV, ch. 20 : *De Reformatione*.

4. The Bishop, in giving his judgment, will be guided by the principles of the law, viz. a/ To decide in favour of the existence of the betrothment, he must have a complete proof, to the exclusion of all probable doubt. « Ex indubiis juris principiis cautum est quod sponsalia, veluti indissolubile matrimonii vinculum secum ferentia eoque ipso nativam hominis libertatem adimentia, adeo vehementes et omni exceptione majore exigunt probationes, ut si hinc inde aliqua supersit dubitatio, sit omnino contra sponsalium existentiam judicandum ».

of the betrothment, or for its dissolution, then what we have said under A. will be applicable. If, however, he decides that the plaintiff's opposition is well founded, it will become necessary to follow the course that we shall indicate under C. 2.

In the meantime both parties are free to appeal from the decision of the Ordinary to the Metropolitan, or even to the Holy See. Rome has frequently to decide these cases on appeal, and to confirm or quash the sentence passed by the episcopal court.

C. If on the other hand it is *shown* that *the betrothment was contracted validly and absolutely* (¹), and that it has not been dissolved, or rendered subject to rescission at the will of the man, then, without reckoning the diriment impediment of public decency, he is faced by an impedient impediment, commonly known as *Nihil transeat*, which prevents the marriage of the young man with a third person. This premised:

1. The parish priest will do his best to induce the man *to keep his first engagement*, and marry the plaintiff. If he is met with a categorical refusal, or if he has reason to fear that the marriage will prove disastrous, he will endeavour to persuade the *fiancée to renounce her right*, either of her own accord and gratuitously, or in consideration of a promised compensation. This renunciation would at once dissolve the betrothment by mutual consent, and would consequently remove the marriage impediment arising from it, so that no reason would remain why the young

c/ if the parish priest finds that the betrothment is valid and not dissolved, he cannot proceed,

but will cause the betrothment to be kept, either by his own authority,

S. Rota in *Causa Brundusina* 5 Apr. 1851, in the *R. Th. Fr.*, 1901, p. 479. Cf., the solution of the case of 23 May 1869, in *A. S. S.*, V, p. 77 ss.; BANGEN, *Instr. Pract.*, I, p. 78; *Instructio Austriaca*, n. 198: « Praesumptio stat pro libertate in conjugis electione; unde contra sponsalia pronuntiandum est, quoties de eorumdem validitate plene non constat ».

b/ To decide *for the dissolution*, dissolution is not presumed, but the presence of a canonical cause of dissolution must be proved, since it is necessary to take into account not only what favours liberty, but also the right acquired by the other party. But for the different causes of dissolution the proof required will not be always the same: « For if the cause of dissolution of the betrothment consists in either an invalidating or a prohibitive impediment of marriage, then there is a spiritual danger at stake, and consequently a full proof is not required, but half a proof suffices... but if there is question of a cause of dissolution which merely gives to one of the contracting parties the faculty of breaking his (or her) engagement, then a full proof is required ». SANTI, l. c., n. 67-68.

1. For conditional betrothment, see above, n. II.

man should not marry the lady of his choice; if, however, she happened to be a blood-relation of his former *fiancée* in the first degree, it would be necessary to obtain first a dispensation from the impediment of public decency (¹).

or by the in-
tervention of
the Bishop,

2. If the efforts of the parish priest are unsuccessful, the matter should be laid before the Bishop, if that has not already been done, and in the meantime the publication of the banns should be suspended and the marriage deferred.

The Bishop: a/ if he judges it opportune, *may compel* the young man to marry his first betrothed, even under the threat of a censure; but he cannot have recourse to that, until he has exhausted every means of persuasion. That the Bishop has this right is clear from ch. 10, X, IV, 1 (²), and from different Roman declarations (³), and it is affirmed by the common teaching (⁴). Nevertheless the exercise of this right is subject to certain restrictions in practice. Thus the S. C. de P. F., 22 Nov. 1760, enjoins that women (⁵)

1. The Bishop of Bruges *in virtue of quinquennial faculties* from the S. C. de P. F., has power to dispense « from the impediment of public decency, arising from lawful betrothment ».

2. In this chapter Alexander III directs a bishop, who had consulted him about a man who had unjustly cancelled his betrothment : (« quatenus, si hoc constiterit, eum moneas, et, si non acquieverit monitis, *ecclesiasticis censuris compellas* ut ipsam (nisi rationabilis causa obstiterit) in uxorem recipiat, et maritali affectione pertractet »).

3. See the decree, which we shall presently quote, of the S. C. de P. F.; the case given by BANGEN, *Instr. pract.*, p. 105 ss., and another given by ROSSET, o. c., t. II, p. 965.

4. SCHMALZGRUEBER, in l. IV *Decret.* tit. I, n. 92 ss., with the authors quoted; REIFFENSTUEL, o. c., in h. l., n. 152 ss.; BENED. XIV, *Instit. eccl.*, 46, n. 15; GIOVINE, o. c., I, p. 325; SANTI, in h. l., n. 38 ss.; BANGEN, *Instr. pract.* I, p. 15; AICHNER, o. c., 1905, p. 580; SCHERER, o. c., § 118, notes 101 and 102; WERNZ, o. c., t. IV, n. 100, note 104; ROSSET, l. c.; GASPARRI, o. c., t. I, n. 70; DE ANGELIS, o. c., III, l. I, n. 5; LAFOURCADE, o. c., p. 160 ss.

5. « Non deest autem causa propter quam mitius in feminam, et acrius in masculum animadvertatur. Naturalis omnino imbecillitas levitasque muliebris non longe est ut despectum censurarum pariat; magisque suspicari licet ne femina a fide, quam coacte spondit, facilius desciscat. Caeteroquin summum est inter virum et mulierem in hac materia discrimen, ut mulier, si a sponsalibus declinet, nullum irroget praejudicium viro, cui altera ad nubendum nunquam deficiet femina; sin vero a sponso mulier relinquatur, gravissimam nominis subit diminutionem ». S. Rota in causa *Majoricen.* 24 Apr. 1746, apud GIOVINE, l. c.

who withdraw from their betrothment should never be excommunicated; that even men should be dealt with in this matter with great circumspection, and that censures should never be employed where it is foreseen that lamentable consequences will ensue. The S. Congregation moreover requires that where censures are inflicted, they should be removed at the end of a year (1).

Whence it follows that though we cannot, in theory, deny that the Church has the power to compel recalcitrant *fiancés* to marry, even by the employment of censures, yet practically speaking, the fear of an unfortunate ending, and the weakness of human nature almost always stand in the way of coercion and the infliction of canonical penalties (2).

Ordinarily, therefore, the Bishop: *b/* will endeavour to bring about an *amicable arrangement*, and direct all his efforts to induce the *fiancée* to renounce her right, and the young man to pay her an equitable compensation. He will make the young lady understand how imprudent and absurd it is to force her faithless *fiancé* to marry her, and what an unhappy time they would have together as man and wife.

If all efforts are useless, if the plaintiff sticks to her right, and there is no way of compelling the man to carry out his engagement, then it only remains

3. to have recourse to *the Holy See* to obtain a dispensation from the impedient impediment arising from the betrothment. Only the Pope, as we have seen, has the power to grant this dispensation.

1. *Collectan.* S. C. de P. F., n. 1214; Cf. also c. 17, X, IV, 1, *Requisivit*, in which Lucius III says of a woman who wished to break her betrothment, that she is to be admonished rather than compelled.

2. We must understand that c. 10, IV *Decr.*, 1, establishes the *right*, while c. 17 contains rather a *derogation of the right*, a derogation, it is true, that takes effect in a great number of instances. In this way the two chapters may be reconciled. On this subject see the different opinions in ROSSET, o. c., n. 973; SANTI, l. c., n. 40; GASPARRI, l. c., n. 70, and DE ANGELIS, l. c.

*who will try
to obtain the
fiancee's
renunciation,*

*or ask a dis-
pensation
from Rome.*

APPENDIX

THE ANTENUPTIAL PROCLAMATIONS.

We shall treat successively of 1. the existence of the law concerning banns, the persons affected by the law, and its binding force ; 2. the place, the number of times, the occasion, and the form to be observed in the publication of the banns ; 3. the causes that remove the obligation of the law ; and 4. the duty of making known impediments that stand in the way of a marriage.

I. EXISTENCE OF THE LAW, PERSONS AFFECTED, BINDING FORCE.

A. Existence.

35.
The law concerning the publication

Without speaking of the obligation of publishing the banns ⁽¹⁾, that formerly prevailed in different parts owing to particular laws or local customs ⁽²⁾, we shall content ourselves with saying that the Church has established a universal law in this matter, as follows :

1. *In the Fourth Council of Lateran* (1215), ch. 3, X, IV, 3 : « Extending the special custom of certain places ⁽³⁾ to others in general,

1. *Bannum* signifies 1. jurisdiction and the territory of jurisdiction (*bannum imperii*) ; 2. an edict issued by one who has jurisdiction (*de Dei et nostro banno bannimus ut nemo...*) ; 3. the publication of an edict ; 4. a penalty for the transgression of an edict, especially forfeiture of goods and banishment. Cf. *Kirchenlexikon*, under *Bannum*.

2. WERNZ, o. c., IV, n. 135 ; GASPARRI, o. c., n. 149 ; 27, X, IV, 1, in the decree of Innocent III, 1212.

3. Innocent III alludes to the custom of the Church of Gaul, which he mentions 27, X, IV, 1. According to the *Ordines* given by MARTÈNE, (o. c., l. I, p. 23, pp. 627, 630, 637, and 640) already from ancient times it was the custom to make a *threefold* publication of the banns, on Sundays or festival days ; and even on the very day of the marriage, mention being made of the completed threefold publication, a *fourth* was added, as they said « *ex abundantia* ». See below, n. 39.

we decree that, when marriages are to be contracted, they be publicly announced by the priests in the churches ».

2. *The Council of Trent*, Sess. XXIV, ch. 1, *De Reformatione matrimonii* : « Following in the footsteps of the Sacred Council of Lateran.... ordains that henceforth, before marriage is contracted, thrice by the particular parish priest of the contracting parties, on three consecutive festival days, in the church and during the public mass, it shall be publicly announced who the parties are between whom marriage is to be contracted ».

The discipline introduced by the *Council of Trent* is obligatory for all parishes in which the decree *Tametsi* has been duly promulgated, at least so far as this provision is concerned. Other countries remain subject to the discipline of the Council of Lateran, and to the precepts of the particular law (*).

The end that the Church has in view, is to make the marriage public through the publication of the banns, and above all to discover any impediments to the marriage, whether impedient or diriment, that may exist.

B. Persons affected by this law.

The obligation of seeing that the antenuptial proclamations are made rests upon the contracting parties, but most especially upon *their own particular parish priest*, whose duty it is to publish the banns. The Council of Lateran lays this duty on the *priests*, that is to say, in accordance with the language of the period, the particular priests, and the Council of Trent expressly designates the *particular* parish priest of the parties about to marry. Nevertheless there is no reason why the parish priest should not delegate another person for this purpose, though, except in case of necessity, it is not becoming that this person should be a laic, or a cleric not yet sufficiently advanced to preach.

especially binds the parish priest of the contracting parties,

C. Binding force of the law.

The publication of the banns is not necessary for the *validity of marriage*, but only for its *lawfulness*. But in view of the purpose

under grave sin.

1. We confine ourselves almost entirely to the Tridentine law. In the coming codification this will probably be extended to the entire world for the marriages of catholics.

of the law, its obligation is grave, as one may readily infer from the severity of its *sanction*. ⁽¹⁾.

Observe that the discipline concerning these proclamations has this peculiarity, in common with that affecting the celebration of marriage, that, in accordance with the wish of the Council of Trent, Sess. XXIV, ch. 1, in addition to the common law, the different local customs that prevail in many places are to be maintained ⁽²⁾.

II. PLACE, NUMBER OF TIMES, OCCASION, AND FORM OF PUBLICATION.

A. Place of publication,

The publication ought to be made :

1. In the parish in which *each of the parties* has a *domicile* ⁽³⁾ or a *quasi-domicile* ⁽⁴⁾. For *vagi* (those who have no domicile

1. Namely a/ a *secular priest*, who through contempt has neglected to prohibit such unions (i. e., those forbidden on account of the omission of the banns), or a *regular* who has presumed to assist thereat, is to be suspended from his office for three years, and yet more severely punished if the nature of his fault requires it (3, X, IV, 3). This penalty takes effect only after sentence has been pronounced (*ferendae sententiae*).

b/ In virtue of this same Lateran decree, if the *engaged parties* contract marriage in spite of the omission of the banns, they are to be punished, and if their marriage is null through some diriment impediment, even quite unknown, their offspring will be illegitimate. According to the Council of Trent, Sess. XXIV, ch. 5, *De reform. matr.*, such pseudo-married people are to be separated, without hope of obtaining a dispensation later, that is to say, they will not get one without great difficulty.

c/ For the witnesses, « who assist at such marriages, we find no penalty imposed either by the Council of Lateran, or by that of Trent ; but most diocesan synods have thought it right to employ even against them the penalty of excommunication *latae sententiae* (incurred by the act itself) ». BENED. XIV, *De syn. dioc.* t. XII, ch. 6, n. 2.

2. Cf. ESMEIN, o. c., II, p. 173 ss.

3. The idea of domicile, both *in fact* and *in law*, will be explained later, n. 72, where we speak of the form of celebrating marriage.

4. According to the decree *Ne temere*, and the decree of the S. C. C., of 28 March 1908, ad V (as we shall say in n. 72), there is no longer need to give attention to *quasi-domicile for the licit celebration of marriage* : a residence of one month being sufficient. But the very restriction imposed by the S. Congr. shows that this modification of the law is not general, and consequently, pending

36.

The banns
ought to be
published :

1. in the pa-
rish of each
of the parties ;

or quasi-domicile), the publication takes place in the parish in which they happen to be actually residing. This first rule follows from the purpose of the law, and from the terms employed by the Council of Trent, which enjoins that the publication of the banns should be made by the *particular* parish priest of the contracting parties.

On the same grounds the banns of those, whose domicile or quasi-domicile is in different parishes, must be published in *their respective parishes* ⁽¹⁾; and if one or the other has two domiciles, or a domicile and a quasi-domicile, then the publication must be made in all these different places.

It sometimes happens that strict observance of the law would lead to utterly useless publication. In such a case we cannot say that the law lapses, as we shall show later, but there is then good reason to ask for a dispensation, or for the Bishop to make some special provision. It happens thus, for example, when the engaged parties have very recently acquired a new domicile or quasi-domicile; or when their legal domicile is a place where they are quite unknown and have never resided; the same may be said with regard to *vagi* who make a merely momentary stay in a place.

2. In the parish that the engaged parties have *lately left*.

According to the strict letter of the Tridentine law there is no need to publish the banns in a parish the parties have recently left; but taking into account the purpose of the law and the desire of the Holy See ⁽²⁾, there is reason to do so, at least in the case of a *recent* departure. Local legislation in a number of dioceses has wisely decreed that this should be done, and such a course is, as

2. in the parish lately left;

a more ample extension, we think that it is necessary to maintain, in the matter of the banns, the former discipline, according to which the particular parish priest is the parish priest of the domicile or *quasi, domicile*, in the proper acceptance of the term. See in this sense *N. R. Th.*, 1909, p. 178; *Rev. du clergé fr.*, t. LVII, p. 353; VAN DEN ACKER, O. C., p. 44; SCHAEPMAN, *Ned. Kath. Stemmen*, 1910, p. 135; SÄGMÜLLER, in *Theol. Quartalschrift*, 1910, p. 644; BESSON, *N. R. th.*, 1911, p. 262 s.; KNOCH, *Rev. ecclés. de Liège*, t. VII (1911), p. 7; and in a contrary sense the *Collat. Gandav.*, I, p. 75 and II, p. 191.

1. Cf. *Rit. Rom.*, tit. VII, ch. I, n. 8.

2. See the replies and solutions of the S. C. C. (*R. th. fr.*, 1901, p. 117 s.) given by the Consultor in the *causa Colon.*; cf. also the *Instr.* of the C. S. O., 22 Aug. 1890.

we have seen, in accord with the wishes of the Council of Trent (1).

3. in other places as circumstances may require.

3. And in some other *parishes*, as circumstances may require ; but especially in the place of *origin*, if the contracting parties have resided there for a considerable time after attaining a marriageable age. The same should be done in the case of *vagi*, or those who lie under any suspicion of impediment. This is evident from the object of the law, and from the Instruction of the C. S. O., quoted in note.

Publication should be made in the parish church.

Lastly the publication of the banns should be made *in the church*, as expressly ordained by the Councils of Trent and Lateran. By the church is understood the *parish* church, since the publication is to be made by the *particular parish priest* of the engaged parties. For the purposes of this law we can consider, as on the same footing as a parish church, a quasi-parish church, or chapel of ease, that has a district so distinct from that of the mother-church, that residents of the one district are unknown to those of the other (2).

Though as a general rule the publication of the banns should be made in the parish (or quasi-parish) church, there is no reason why it should not at times take place in some other church, or even in some sanctuary, where, on the occasion of a special feast, mass is celebrated in the presence of a great concourse of people ; for, having regard to the object of the law, and the clause *inter missarum solemnita*, it would seem that the presence of the people is of even greater importance than the place itself.

When the par-

Note. When the engaged parties belong to *different parishes*, the

1. « The publication ought to be made in the place of domicile or quasi-domicile. It is also expedient that it should be made in the place of origin, if the contracting parties have resided there after having attained the age required for marriage, and even in other places where they have dwelt for at least ten months, unless they have a fixed abode of several years in the place where the marriage is to take place ». *Instr.* of the C. S. O., 22 Aug. 1890, in the *Collectanea*, n. 1376, a. 12.

2. This is set forth in the *Causa Coloniensis*, already referred to, where the S. C. C. gave the following solution : « Attentis peculiaribus circumstantiis in casu occurrentibus, publicationes matrimoniorum in ecclesiis filialibus posse sufficere ». The *R. th. fr.* 1901, p. 125, gives the remarkable *Votum* of the Consultor.

respective parish priests cannot proceed to publish the banns ^{ties belong to different parishes.} until they have mutually received notification of the absence of any known impediment ⁽¹⁾. In other words, the parish priest of the man will inform the parish priest of the *fiancée*, before whom the marriage is to be celebrated, that his parishioner is free from impediment ⁽²⁾. On receipt of this notice, the parish priest of the *fiancée*, after having duly examined her, and found her likewise free, will invite his colleague to publish the banns, ⁽³⁾ and will proceed to do the same himself.

B. Number of times of publication.

1. In the parish of domicile or quasi-domicile, or of actual residence in the case of *vagi*, the banns must be published ^{37.} *three* ^{Number of times of publication ;} times. This is expressly ordered by the Council of Trent.

2. In a parish that has recently been left, one must comply with the provisions of the local law ⁽⁴⁾.

3. In the place of *origin*, or in other places, where, apart from the provisions or the law, it is considered desirable to publish the banns, the number of the publications rests with the Ordinary or the parish priest, according as one or the other has taken the matter in hand.

4. With regard to the *repetition* of the banns, we read in the *Rituale Romanum*, l. c., n. 11 : « If the marriage does not take ^{when, and how often the banns are to be repeated.} place within two months after the publication of the banns, they must be repeated, unless the Bishop decides otherwise ⁽⁵⁾. »

1. Cf. *Liber manualis*, p. 189, where we find : « Quod quidem parochi testimonium, si sit ex aliena diocesi, ab ipsius Ordinario recognitum sit oportet, nisi aliunde sit notum ».

2. A note in this or some similar form would suffice : « *Revde Dne Pastor. — Tuto denunciari potest, quantum ad me spectat, matrimonium N. N. parochiani mei cum N. N. una ex tuis*. »

3. This is the formula : « *Revde Dne Pastor, — Digneris matrimonium N. N. parochiani tui cum N. N. parochiana meu, ad tramites juris, publice proclamare et rescribenda rescribere*. »

4. In the diocese of Bruges publication is to be made *once* in a place left within the preceding *six months*.

5. According to the *Statuta dioec. Brug.*, « ubi proclamationes antenuptiales antiquiores fuerint *tribus mensibus*, novae proclamationes *semel* fieri debebunt...; si antiquiores *anno* fuerint, *ter* fieri debent ».

Note. The *Council of Lateran* did not determine how many times the banns are to be published, and so strictly speaking, *one publication* is enough. Accordingly a single publication satisfies the law in those places that are subject to the Lateran discipline only, unless, of course, more is required by special local legislation.

C. The occasion for publishing the banns.

38.
publication is
to be made on
three festival
days,

Publication must be made on three *consecutive festival days*. By *festival days* are to be understood properly days of obligation : nevertheless the *abrogated days of obligation* can also be counted as such, at least with the approval of the Bishop, and if the church is not left without a concourse of people on those days ⁽¹⁾.

At the same time it will not suffice to make pretext of the assembly of people in order to enable the banns to be published on *an ordinary weekday*, without the permission of the Bishop ; but on the other hand publication is not forbidden during Advent and Lent, unless expressly prohibited by the local law.

that are con-
secutive,

We say : three *consecutive festival days*, i. e., without interruption, omitting days that are not holidays. It would be quite lawful to publish the banns thus, even when the three days followed *immediately* one after the other, as, in some cases, when Christmas Days falls on a Monday or Friday. Nevertheless such rapid procedure would seem to be more conformable to the letter than to the spirit of the law.

during pub-
lic mass.

Finally the publication ought to be made during the *high mass*, that is to say, during the parochial or conventual mass. Out of this time, publication must not be made, notwithstanding the concourse of people, whether at vespers, or on the occasion of a sermon, unless there is some urgent necessity ⁽²⁾, or the consent of the Bishop has been obtained ⁽³⁾.

I. GASPARRI, O. C., n. 166 s.; FEYE, *De Imp.*, n. 240-245. In the diocese of Bruges, the *Statuta* p. 144, lay down : « Diebus quibus, juxta *Pastorale Brugesense* (*), proclamationes faciendae sunt, addere jam licet festa abrogata, modo in illis diebus sufficiens detur populi ad ecclesiam concursus ».

2. For example, if the banns have been omitted at mass, and the marriage cannot be deferred.

3. See the decree of the S. C. O., 25 Oct. 1850, in GASPARRI, O. C., n. 170.

(*) According to the *Pastorale* it was necessary to make publication « on Sundays or days of obligation. »

D. Form to be observed.

The approaching marriage must be announced in the vernacular, and in a loud and intelligible voice (¹); it is necessary to declare the surname and christian name of each of the engaged parties, to indicate their place of origin and residence, their condition whether of celibacy or widowhood, and to add in the latter case the name of the former husband or wife. It is necessary also to mention any dispensation from public impediments that has been obtained, and to state precisely on each occasion whether it is the first, second, or third time of publication. Finally the faithful are to be reminded of the obligation they are under to make known any impediments that they may know of. Nothing, however, that might bring disgrace on the engaged parties must be published (²).

39.
Form to be
observed.

This consent is given, for the diocese of Bruges, in the *Pastorale Brugense*, p. 122 : « Before celebrating marriage... the banns must be published at the principal mass, or at the sermon, or at some gathering of the people ».

1. In 1908 an indult was granted to the Archbishop of Paris, « in virtue of which he is for the future permitted, in parishes of his diocese that have *ten thousand or more parishioners*, to satisfy the Tridentine law (relating to the banns) by affixing in a conspicuous place in the church, during three consecutive holidays, written forms announcing the coming marriages ; these forms are to remain affixed during the whole day, from the first mass in the morning until the last liturgical service in the evening ». *Collat. Brug.*, t. XIII, p. 471 s.

2. The following is a specimen of publication according to the formula of the ancient ritual of the church of *Limoges* : « N. N. fils de N., de tel lieu et N. N. fille de tel, demeurant en tel lieu et paroisse, se veulent prendre et assembler par loyal mariage, s'il y a aucun ny aucune qui sçache entr'eux lignage, affinité, ny empêchement, par quoi le mariage ne doive se faire, s'il le dit sur peine d'excommuniement avant qu'on procède plus avant. C'est pour le premier banc, ou pour le second ou pour le tiers ».

Afterwards, on the day of the marriage, before the ceremony, a fourth publication was made, prescribed as a superaddition : « Nous avons proclamé en l'église de céans trois bancs solennellement par trois jours solennels, pour le mariage que N...ici présents, entendant à contracter et faire ensemble à l'honneur de Dieu et de la Vierge Marie, auquel nul n'a contredit. Derechef nous proclamons le quatrième banc d'abondance, en faisant commandement s'il y a aucun qui sçache nul empêchement légitime... s'il le dit sur peine d'excommuni-cation, ou autrement nous déclarons excommuniez tous ceux qui malicieusement nous voudront caicher feaux troublemens et empêchemens ». MARTÈNE, o. c., L. I, p. 2, p. 640.

40.
Practical ob-
servation.

Note. 1. « It is generally admitted that the parish priest may receive for the publication of the banns some slight remuneration from the engaged parties ⁽¹⁾ ». In this matter parish priests ought to conform themselves to the existing custom and local decrees ⁽²⁾.

2. Should there be an impediment, one cannot proceed to the publication of the banns until the requisite dispensation has been obtained ; and if the impediment does not come to light before the publication has begun, it is necessary to suspend publication for the time being ⁽³⁾.

3. When the publication of the banns has been duly completed and no impediment has presented itself, one can proceed to the celebration of the marriage ⁽⁴⁾. But if the engaged parties belong to different parishes, the parish priest of the bridegroom should first inform the parish priest of the bride that there is no impediment ⁽⁵⁾.

I. GASPARRI, O. C., n. 159.

2. *In the diocese of Bruges* it is provided that *honoraria* cannot be demanded for the repetition of the banns, when this is made once, i. e., when the previous publication was made more than three months and less than a year ago ; but if the previous publication was a year ago, the usual *honoraria* may be demanded for the fresh banns. — « When the banns are published in a parish in which the engaged parties do not reside, the parish priest cannot demand, on account of this publication and the due notification of it, more than a franc and a half ; and from the poor nothing at all is to be demanded ». *Stat. dioec. Brug.*, p. 143 ss., where is added : « Owing to this provision the poor will more readily consent to the additional publication of their banns in a parish in which they are not actually residing at the time ».

3. « As often as a dispensation from Rome is required, the parish priests will see that the engaged parties do not present themselves for the civil ceremony before the dispensation has been granted. They must also defer the publication of the banns ». *Lib. man.*, p. 190.

4. The local decrees of the *diocese of Bruges* require, « that there should be at least one *intermediate* day between the last publication of the banns and the celebration of the marriage ; except in the case of *workmen* and *the poor*, who may be married on the Monday following the third publication. *Deans* have the power to *dispense* the rich from the obligation of the intermediate day... when necessary or expedient, provided a dispensation from two publications of the banns has not been given ». Cf. *Pastorale Brug.*, p. 122, and *Stat. dioec. Brug.*, p. 67. Note that the usage of the intermediate day is met with in the ancient *Ordines*. See MARTÈNE, O. C., L. I, p. 2^a, p. 637 and 640.

5. The following form might be used : « N. N. parochianus meus et N. N. parochiana tua in ecclesia mea ter (vel semel aut bis, cum dispensatione in 2^o et

III. CAUSES THAT REMOVE THE OBLIGATION OF PUBLISHING THE BANNS.

A. The parish priest *is not authorised to omit* publication :

1. In the case in which it is *useless*, whether this arises from the fact that the contracting parties are unknown in the parish in which the law requires that their banns should be published (as in the different cases enumerated in n. 36, and for which we have said a dispensation should be sought), or because there is no suspicion of impediment. The reason is that the law in question is founded not on a presumption of the fact, but on a presumption of universal danger.

41.
*Uselessness
does not
excuse,*

2. Nor because the *civil* publication has already been made. The C. S. O. expressly says this in its decree of 12 Jan. 1881 (¹); moreover it is clear from the wording of the Lateran and Tridentine decree that the law requires that publication of the banns should be made *in the church*; in addition to this the civil law ignores many impediments that are recognised by canon law.

*nor the civil
publication.*

B. Among the causes that remove the obligation of the law, whether in virtue of a legal provision, or by custom, are reckoned :

42.
*On the other
hand we must
admit :*

1. The *case of urgent necessity* that demands the immediate celebration of the marriage without leaving time for the publication of the banns or for recourse to the Bishop. In such a case the parish priest can omit the banns, and assist at the marriage, at least *ex epikeia*. But this urgent necessity will hardly ever arise except at the death bed of a man living in concubinage whose position requires putting in order by marriage.

*1. urgent
necessity ;*

If the sick man afterwards recovers, the matter must be laid before the Bishop, who, according as he thinks fit, will either keep to the rules laid down by the Council of Trent, l. c., and order the proclamation of the banns before the consummation of the marriage (²), or simply give a dispensation, assum-

in 3º, aut in 3º banno) proclamati sunt, et nullum innotuit impedimentum. Quare ad eorum matrimonium, quantum ad me attinet, tuto procedi potest ».

1. *Collectanea* of the S. C. de P. F., n. 1224.

2. This clause of the Council of Trent, enjoining in such a case the publication of the banns *before the consummation of the marriage*, is not in accord with the actual conditions of life at the present day.

ing that the absence of impediment is sufficiently assured (¹).

2. marriage
of princes ;
3. mixed mar-
riage ;

2. The case of *great princes* (²).

3. The case of a *mixed* marriage, or marriage between a catholic and a non-catholic.

As we shall point out later on, the antenuptial proclamations are reckoned among the ecclesiastical rites, which are not to be employed in the celebration of mixed marriages. Nevertheless, according to circumstances, the publication of the banns *may* be permitted in the case of such marriages, but without any mention of religion (³).

4. *Dispensation.*

43.
4. dispensa-
tion,

The *authority* in the matter of dispensation, in accordance with the provisions of the Council of Trent, l. c., is the *Ordinary*, and he can exercise this power either by himself or through a delegate (⁴).

to be asked for
by parish
priest of bride,

The *parish priest of the bride* must apply for the dispensation, when needed ; and it is also his business to inform the parish priest of the bridegroom that a dispensation has been obtained, when he asks him to publish the banns, so that he may take note of the fact in making publication.

1. The Council of Trent, l. c., makes the following concession : « If there is reason to fear that the marriage may be maliciously opposed, if such a full publication is made, then a single publication may suffice, or the marriage may be celebrated (without the banns) in the presence of the parish priest and two or three witnesses », but with this provision that the banns shall be published afterwards, before the consummation of the marriage, unless the Bishop thinks it right to omit them. But under such circumstances there is usually time for recourse to the Bishop, and it is better to take that course at first, so that he may dispense, if needful.

2. GASPARRI, O. C., n. 154 ; WERNZ, O. C., n. 136, note 17 ; BASSIBÉY, *De la Cland.* n. 204.

3. Cf. *Collat. Brug.*, t. XII, p. 333 and 335, note ; see also in *N. R. th.*, XV, p. 589-593, the decisions of the Holy See in this matter, as well as the decree quoted by the *Collectanea*, n. 1223.

In England the Bishops are empowered to permit the banns in the case of a mixed marriage, and such is the general practise there. Cf. *Acta S. Sedis*, t. VI, p. 456.

4. In the *diocese of Bruges* the *Deans* are delegated, and have faculties to dispense, for canonical reasons, and in the accustomed form, the faithful of their respective districts from one or two publications of the banns. *Stat. dioc. Brug.*, p. 67. On the following page we find that the fee for these dispensations is two francs and a half for each publication.

If the engaged parties belong to *different dioceses*, it would, strictly speaking, be necessary to seek a dispensation from each of their respective Bishops, but in many places, in virtue of an express or tacit understanding between Bishops, the dispensation of *one only* is sufficient. In practice, therefore, the dispensation is asked for from the Bishop in whose diocese the marriage is to take place, and the other Bishop is requested to testify the free state, that is to say, the freedom from impediment of his subject (¹).

and given by
the Bishop of
the place
where the
marriage is
celebrated ;

There must be a legitimate *cause* for granting a dispensation. Benedict XIV insists on this in his admonition to the Bishops that « they have no power to dispense instantly and indiscriminately, but only to act in the matter with prudence and for legitimate reasons (²) ».

there must be
a legitimate
cause for dis-
pensation,

With regard to the *gravity* of the cause, a graver reason is certainly required for dispensing from the three banns, than from one or two ; but Bishops must not be too easy (³) in dispensing even from one or two publications, and the mere wish of the contracting parties can never be considered as a cause (⁴).

1. The arguments for and against this practice will be found in the *N. R. th.*, I, p. 452 ss. Cf. also WERNZ, o. c., IV, n. 142, note 44 ; FEYE, *De Imp.*, n. 266 ; GASPARRI, o. c., n. 183 ; DE BECKER, *De Matr.*, p. 252.

If the engaged parties belong to *different deaneries*, the dispensation of the dean of the bride is sufficient, according to *Stat. dioc. Brug.*, p. 68.

2. Constit. of 18 May 1743 : *Nimiam Licentiam*, § 13.

3. Benedict XIV, l. c., § 15, deals very severely with the abuse of excessive indulgence : « Nec obtentu, praetextu, aut colore cujuscunque consuetudinis et usus hactenus quomodolibet inventi,... ea, quae ad haec usque tempora, super denuntiationibus sine legitima causa dispensandi, versa est in fastidium et tot litium fomitem, facilitate deinceps abuti audeatis ; perniciosa enim consuetudo et auctoritatis abusus, non ad normam agendi sed ad male actorum exprobrationem confert ». This need of a canonical cause is also urged by the Bishop of Passau in a recent decree, given by the *Arch. f. k. Kirchenr.*, 1909, p. 739 s. ; and by the Bishop of Bruges, in the prosynodal congregation of 1910 (Cf. *Coll. Brug.*, t. XV, p. 327).

4. Often the contracting parties have no other reason for seeking a dispensation than the desire to imitate, out of mere vanity, the rich and noble, in favour of whom a dispensation from the banns is commonly given in part. Experience shows that if those in a high social position were content to have their banns published in accordance with the ordinary law of the Church, this craving for unjustifiable dispensations would quickly disappear.

whether total, A dispensation can be given for the *following causes* : a/ *from all three banns* : in case of urgent necessity for immediate marriage ; as, for example, when the parties are on the point of starting for a foreign country, on the supposition that there is time for recourse to the Bishop. So in like manner, when it is a question of contracting a marriage of conscience ; or again, though this is of rare occurrence, when there is good reason to fear that if the banns are published, the marriage will be hindered by the machinations of an opponent. Finally, as we have seen above, the absolute uselessness of the publications required by the letter of the law, in the case of parties altogether unknown in the parish, may sometimes be a sufficient cause for dispensation.

or partial. b/ For a dispensation *from one or two of the banns*, any legitimate reason for hastening on the marriage, such as the fear of scandal owing to an advanced state of pregnancy, the danger of incontinence, a well founded suspicion that the parents will withdraw their consent, the approach of the prohibited time, etc., is sufficient. Yet another sufficient cause would be the desire to avoid exposing parties of an altogether unequal age or condition to prolonged public derision, and in like manner, the fear of occasioning the parties acute disappointment by a refusal of a dispensation, provided it is morally certain, on other grounds, that there is no impediment to the marriage, Finally, it is generally admitted that noble birth of the contracting parties, or the special merit of one of them justifies a like favour (1).

IV. THE OBLIGATION OF REVEALING IMPEDIMENTS.

^{44.}
The obligation of revealing impediments is grave,
We begin by remarking that in this connection we are considering *before all* those impediments that are of *their nature occult*, taking it for granted that public impediments, from their very nature, generally come to light without any difficulty, since they entail no disgrace, and are besides for the most part quite evident.

A. There is an *obligation*, and a *grave one*, to make known any impediments to a marriage, whether impeding or diriment, whether certain or probable.

This obligation arises not merely from the *ecclesiastical* law (*), but from the *natural* and *divine* law itself. It is, in fact, the natural and divine law that imposes the duty of opposing invalid and unlawful marriages. Respect due to the sacrament, charity to our neighbour, regard for the general welfare make it a duty incumbent on all. Charity towards our neighbour requires that we should endeavour to avert not only the commission of a grievous sin, but also those grave evils that flow from unlawful marriages, and most especially from those that are invalid; the general welfare of society, safeguarded by these marriage impediments, demands the fulfilment of this obligation.

The *gravity* of this obligation is a natural consequence of the gravity of the interests at stake (*). It is necessary to make known the impediments, as soon as one can conveniently do so, and, as a rule, to the *parish priest*. Nevertheless, there is no reason why one should not first endeavour to induce the engaged parties to ask for a dispensation or give up their proposed marriage; if they do so, that is enough, and there is no longer any necessity to mention the matter to the parish priest.

B. This obligation also ceases to bind, if, all things duly considered, there is a sufficiently *grave reason* for keeping silence.

1. Thus it is neither obligatory nor lawful for a priest to reveal an impediment that he has knowledge of *only under the seal of confession*; for the law of sacramental secrecy is absolute, and yields to no other. *except in the case of the seal of confession,*

But if at the same time he knows of the impediment from some other source, he may then speak of it without injury to the secrecy of the sacrament; yet he should always act with prudence, so as not to give rise to a suspicion that he has violated the seal of confession.

2. Neither a mere promise of secrecy, nor the natural obligation *of a professional secret,*

1. *Council of Trent*, sess. XXIV, ch. I, *De Reform. Matr.*; ch. 6, X, IV, 18; ch. 7, X, IV, 11; ch. 3, X, IV, 3. For this last chapter see ROSSET, o. c., n. 1143; DE ANGELIS, o. c., tit. III, n. 5; SANTI, o. c., tit. III, n. 16; *Anal. eccl.*, 1901, p. 189-190.

2. We have seen that this obligation was formerly imposed under pain of excommunication.

of secrecy is an excusing cause ⁽¹⁾; but *professional secrecy* is generally regarded as such. A professional secret is one that is confided to anyone in his professional capacity, as, for instance, to a parish priest, a doctor, as such. A secret of this kind is strictly binding as often as the revealing of it would be to the detriment of *the very person who came to ask advice*; e. g., the making known an impediment disgraceful to him, or causing him any other injury ⁽²⁾.

The common good requires that it should be so; for it is important that all should be able to go with complete security and confidence to those whose business it is to give assistance and advice to others in their professional capacity: but this confidence and readiness to seek advice would cease to exist, if people knew that their confidential disclosures could not be kept secret ⁽³⁾.

and of grave
injury, espec-
ially person-
al.

3. A third sufficient excuse is that of *grave and personal injury*, whether to one's goods or good name, that would result from revealing the secret. Nevertheless, *every* grave injury is not suffi-

1. Neither the *natural* obligation of secrecy, nor *promised* secrecy, even under oath, is an excusing cause, because it is a question of the general good, and if the natural obligation of secrecy sufficed, no impediment of a disgraceful nature could be brought to light.

2. Thus a doctor, when questioned about the malady of his patient, of which he has knowledge from the patient himself, is bound to strict secrecy, whatever may be the incompatibility between marriage and the malady in question, whatever the injury that he foresees must result from it for the other party. Cf. *Coll. Brug.*, t. XV, p. 21 s. Compare, however, the note given later on (n. 141), and the *Theol. Pr. Quartalschr.*, 1910, p. 857 s. Observe that one can more easily make use of a secret communicated by a *third person*, without prejudice to him.

3. Public confidence would not be less shaken, if, as ROSSET suggests, o. c., n. 1149, one made « knowledge of the impediment reach the ears of the parish priest or Ordinary in such a way that the interested party remained quite ignorant as to the identity of the informant »; as a matter of fact, it would be quite enough to destroy confidence, if people knew that the parish priest, the doctor, ... to whom a secret had been entrusted, were *able* to make use of it in such a manner. The majority of modern writers take this view; and among them FEYER, *De Imp.*, n. 369; GASPARRI, o. c., II, n. 117; DE BECKER, *De Matr.*, p. 253; LEITNER, *Lehrb.*, p. 399; WERNZ, o. c., IV, n. 143; *Theol. Mechl.*, o. c., n. 21. qu. 4; LEHMKUHL, o. c., II, n. 677; to these may be added the *Conferentia Romana*, in the *Anal. eccles.*, 1901, p. 191; on the other side we have BALLERINI-PALM., o. c., VI, n. 905, supported by Rosset.

cient to free one from the obligation of revealing every impediment, *no matter what it may be*, but the injury must be proportionably greater, as the anticipated evil consequences of silence are more grave. For this purpose it is necessary to distinguish not merely between impedient and diriment impediments, but also between diriment impediments with relation to one another ; thus a graver motive would be necessary to justify silence about an impediment of the natural law, than about an impediment of the ecclesiastical law ; about a relationship in the first degree than about one in the second only ; and so forth.

While taking account of this observation, we have to add that there are certain considerations of personal injury that suffice to free one from the obligation of revealing any impediments whatsoever, even the gravest, however unheard of the contemplated marriage may be. Thus if it should happen, as we know (1) that it has happened more than once in our own country, that a marriage should be projected between a brother and his natural sister, or even between a father and his own daughter, the woman who knows of this scandalous secret, and whose sin at the beginning was the cause of all this evil, is nevertheless not bound to make the impediment known to the parish priest, nor even to the engaged parties, on account of the shame that she would bring upon herself ; and this is the case even when her avowal is the only means of preventing such an unnatural union.

We have in view especially *personal* injury, for, as a rule, one cannot omit to reveal an impediment on account of the injury,

x. A married woman at X., during the lifetime of her husband, had a daughter by a married man, who was himself the father of a son. In the course of time this son fell violently in love with his half-sister, and wished to marry her. The guilty mother alone knew of the relationship between the engaged parties, but she could not make known the existence of the impediment without bringing disgrace upon herself and provoking a terrible scandal. In another place a woman made known in confession that her daughter, the offspring of her adulterous intercourse, was living with her own father as his wife. Here again the mother was the only person who had knowledge of this abominable incest between father and daughter, and she asked her confessor what she was to do. The *Anal. eccles.*, 1901, p. 189 s. give an analogous case. See also on this subject the solution of the case proposed in the *Theol. Prakt. Quartalschr.*, 1908, p. 97 ss. and by PAUWELS, o. c., II, p. 251 ss.

even though grave, that the revelation of it would occasion to the engaged parties, or to a third person; as, for example, on account of the disgrace that they would incur in the eyes of the parish priest; unless, indeed, the shame would ultimately fall on the informant himself. If it was necessary to spare all the parties concerned, the declaration of impediments, at least of those of a shameful nature, would become illusory (¹).

45.

*The duty of
one who is
excused from
revealing an
impediment.*

Note. 1. Anyone who has a sufficient reason for not revealing an impediment to the parish priest, whether by reason of the injury that he fears for himself, or on account of the secrecy that he is bound to observe, is still bound, as far as he can do so with any prospect of success, to caution the engaged parties, and to urge them to give up the proposed marriage (²), or to induce them, if possible, to seek a dispensation.

There is even no reason why the *confessor* who discovers an occult impediment in the tribunal of penance, should not, when he judges it undesirable to admonish the penitent, take the necessary steps to obtain, without the knowledge of the penitent and under cover of pseudonyms, a dispensation or revalidation of the marriage (³). It is true that in doing so he would be making use of knowledge obtained under the seal of confession, but the law of the *sigillum* does not disallow all use of such knowledge, but only that which, if known as permissible, would be a burden to penitents and keep them from confession; which is not the case here (⁴).

1. In exceptional cases it may happen that the threatened injury to the third parties is such as to justify silence in their favour. Thus, for example, in the first case given in the preceding note, if a stranger had been in the secret, one could hardly oblige this person to stop the marriage, if he could not do so otherwise than by making the whole matter known to the engaged parties, on account of the exceptionally grave disgrace that the revelation would bring upon the parents and the entire family.

2. This would be the case with a doctor, who knew, as a professional secret, that a party to a proposed marriage was impotent.

3. See, on the other side, A. KNOCH, in the *Rev. Eccl. de Liège*, III, p. 114 ss.

4. We are speaking only of use made of the knowledge obtained in confession for the benefit of the penitent himself. Thus if the sister of a *fiancée* accused herself of having had intercourse with her future brother-in-law, this would constitute an impediment of affinity for the young man; but the confessor

2. In what precedes we have treated of *private* denunciation, not of *legal opposition* to the celebration of the marriage. The right of *legal opposition* belongs only to the *parties interested*, and these are not the same in every kind of impediment. *Note on legal opposition.*

Thus for the impediment arising from *betrothment*, the forsaken party alone has the right to institute an action of this kind ; where the impediment is due to *parental dissent*, only the father and mother can take action, and so on in other cases. Cf. DE BECKER, *De matr.*, p. 476.

Appendix. Provisions of the civil law.

1. Antenuptial publication.

The following are the enactments of the law (for Belgium) of the 26 December 1891, as modified by the law of the 7 January 1908 ^{46.} (1), replacing the provisions of the code Napoléon on this subject. *Provisions of the civil law :*

« ART. I. Avant la célébration du mariage, l'officier de l'état civil fait une publication, *un jour de dimanche, à la porte de la maison commune* (2), Cette publication énonce les prénoms, noms, profession, domicile et résidence des futurs époux, leur qualité de majeur ou de mineur, et les prénoms, noms, profession, domicile et résidence de leurs pères et mères. Elle énonce en outre le jour, lieu et heure où elle a été faite ainsi que la commune où le mariage sera célébré (3). Elle est transcrite sur un seul registre, coté et paraphé comme il est dit en l'article 41 du Code civil, et *1. concerning publication ;*

could not set about obtaining a dispensation from it without the previous permission of the penitent.

1. The *Coll. Brug.*, t. XIII, p. 388 ss. give the text and its interpretation. The former of these two laws abrogated articles 63 to 65 and 165 to 169 of the Civil Code, and replaced them by new provisions. The second modified articles 66, 69, 71 and 75 of the same code, and supplemented certain provisions of the preceding law.

2. According to the former wording of art. 63, the publication was to be made in a *loud voice* ; for this article made a distinction between the publication and the written notice that was to be put up. In practice this clause was little observed, and the new text no longer requires it. See THIRY, o. c., n. 257.

3. The law of 7 Jan. 1908 added this last provision to the first article of the law of 26 Dec. 1891. It was introduced in favour of those who wished to raise an opposition to a marriage, so that they might know before what civil officer they ought to make it : because in consequence of the modification made in art. 66 by the same law of 1908, opposition to marriages celebrated in Belgium can now be made only before « l'officier de l'état civil de la commune, où, d'après l'acte de publication, le mariage sera célébré ».

déposé, à la fin de chaque année, au greffe du tribunal de l'arrondissement. (Art. 63 du Code).

ART. 2. *L'acte de publication reste affiché à la porte de la maison commune.* Le mariage ne peut être célébré *avant le dixième jour*, depuis et non compris celui de la publication. (Art. 64 du Code).

ART. 3. Si le mariage n'a pas été célébré dans l'année, à compter de l'expiration du délai de la publication, il ne peut plus être célébré qu'après une nouvelle publication faite dans la forme ci-dessus. (Art. 65 du Code).

ART. 4. La publication ordonnée par l'article 1^{er} de la présente loi sera faite *dans le lieu du domicile ou de la résidence de chacun des époux.* (Art. 166 du Code).

ART. 5. Si le domicile actuel n'a pas été d'une durée continue de six mois, la publication sera faite en outre au lieu du domicile précédent, quelle qu'en ait été la durée.

Si la résidence actuelle n'a pas été d'une durée continue de six mois, la publication sera faite au domicile, quelle qu'en soit la durée.

A défaut de domicile connu dans les cas prévus par les deux paragraphes qui précèdent, la publication sera faite dans la commune où le futur époux a résidé pendant six mois.

A défaut d'une résidence continue de six mois, elle sera faite au lieu de la naissance. (Art. 167 du Code).

ART. 6. Les publications qui devront être faites ailleurs qu'au lieu de la célébration du mariage, le seront à partir du premier dimanche qui suivra la réception de la réquisition écrite de l'officier de l'état civil appelé à procéder à cette célébration. L'officier de l'état civil ne pourra exiger la production d'autres pièces.

Dès le lendemain, il délivrera un certificat constatant la date à laquelle cette publication aura été faite ⁽¹⁾.

Toutefois, si le mariage doit être célébré en pays étranger ou dans une commune autre que celle indiquée à l'acte de publication, le certificat sera délivré à l'expiration du délai de publication, et il constatera, outre la date de la publication, qu'il n'existe point d'opposition ⁽²⁾. (Art. 168 du Code).

1. This provision was introduced by the law of 1908, and is applicable only to *marriages celebrated in Belgium*, the same as the clause relating to objections, which we have just mentioned, and of which the above is a logical consequence. The law decrees that opposition to marriages shall be made before the civil officer alone in charge of the marriage: if, then, publications are to be made elsewhere than in the place of celebration, it is quite natural that the civil officer should not await, before giving the certificate, the expiry of the time fixed for receiving opposition.

2. This second provision concerns especially marriages celebrated *out of Bel-*

ART. 7. *Le Procureur du Roi* près le tribunal de première instance dans l'arrondissement duquel les impétrants se proposent de contracter leur mariage, *peut dispenser*, pour de causes graves, *de la publication et de tout délai* ⁽¹⁾.

La même faculté est accordée aux chefs de mission et consuls de carrière de Belgique, ainsi qu'aux agents non rétribués du corps consulaire belge jusqu'au grade de vice-consul inclusivement, pour autant qu'ils ne résident pas au siège d'une légation ou d'un consulat de carrière sauf à ceux-ci à rendre immédiatement compte à la légation ou au consulat de carrière dont ils relèvent, des causes de la dispense ou du refus de l'accorder ». (Art. 179 du Code).

2. Opposition to a marriage.

The Code Napoléon recognises the right of opposing a marriage only in 2. *opposition*. certain determinate persons, to wit :

a) In the person united by marriage with one of the parties proposing to marry ⁽²⁾ ;

b) In those in the ascending scale, that is to say in the father and in default of the father, in the mother, and in default of father and mother, in the grandfathers and grandmothers, and even in the great-grandfathers and great-grandmothers ;

c) In default of any relation in the ascending scale, in the brother or sister, in the uncle or aunt, in the first cousin (of either sex), but only in the two following cases : 1. when consent of the family council has not been obtained for the marriage of minors who have no living relations in the ascending scale ; 2. when the opposition is based on the insanity of the future husband ⁽³⁾ ;

gium, for which, on the subject of opposition, the regulations anterior to 1908 remain in force. Cf. *Coll. Brug.*, t. XIII, p. 302.

1. See, with regard to this provision of the law of 1891, what we say further on (n. 401), where we treat of marriage *in extremis*. Cf. also *Coll. Brug.*, t. VII, p. 134 ss., and compare with t. I, p. 105 s. An analogous provision was introduced into France in 1907. Under the sway of the Civil Code, which empowered the emperor or the king to give, for grave reasons, a dispensation from the second publication, by a *grave reason* was understood, not merely serious sickness, but necessity for immediate departure, and imminence of confinement. Cf. DEMO-LOMBE, O. C., II, n. 184.

2. A. 172. According to a decision of the French Court of Cassation, of the 14 of April 1902 (*Pas.*, 1903, IV, 118), « l'époux divorcé est sans qualité pour former opposition au mariage de son ex-conjoint avec le complice de l'adultère, dont la constatation judiciaire a déterminé le divorce ».

3. A. 174.

d) In the guardian or in the trustee in the two preceding cases, but only in so far as he is authorized by the family council ⁽¹⁾.

The public magistrates also has power, under art. 46 of the law of 20 April 1810, to oppose the celebration of a marriage in the interest of public order; but in this case the magistrates does not act by way of opposition, but by direct action.

If the opposition is made in conformity with the law, the civil officer, by the terms of art. 68 of the civil code, and under a penalty, cannot proceed to the celebration of the marriage until notice of withdrawal has been given him.

The withdrawal of the opposition can be made voluntarily by him who has raised it, or in virtue of a judicial decision.

The tribunals must pronounce for the withdrawal of the opposition, if that is not founded upon one of the impediments, whether diriment or impiedent, recognised by the civil law. Those in the ascending scale differ from collateral relations in this, that the former are not bound to make known the motives of their application to the court ⁽²⁾; but if this is not based on the law, the tribunal will pronounce for the withdrawal of the opposition ⁽³⁾.

Note. If oppositions to the celebration of a marriage are notified to him or by persons to whom the law does not accord this right, either apart from the cases determined by law, the civil officer is not bound to suspend the celebration of the marriage; but, if the impediment to the marriage appears to him genuine, he will almost always delay, so as not to expose himself to the penalties provided against civil officers who proceed with a marriage that is subject to an impediment, Cf. PLANIOL, o. c., nn. 801 and 824; CORBET, o. c., p. 15 s, who shows the difference between the effects of an opposition made in conformity with the civil code and those of every other opposition ⁽⁴⁾.

1. A. 175.

2. Art. 173, and compare with articles 176 and 179.

3. See further on, n. 250, in the note.

4. For the British law see appendix.

BOOK II

MARRIAGE

BOOK II

MARRIAGE

PART I

MARRIAGE IN GENERAL

Marriage may be regarded in the first place *in fieri*, that is to say, as a *contract*, and in the second place *in facto esse*, or as the conjugal union established by the contract between husband and wife. This contract, as we shall show later, is, between Christians, a *sacrament*, and consequently it also may be regarded from a two-fold point of view : a) as being simply a contract, abstracting from the sacrament ; this is what marriage is in reality among non-christians ; b) as having been raised to the dignity of a sacrament.

In the first section, then, we shall treat of the matrimonial *contract* regarded *in itself* ; a second section will be devoted to the matrimonial *contract as a sacrament* ; and a third to the *conjugal union* ; this will be followed by a fourth section dealing with the *regulation of marriage* both as a contract and as a union.

47.
*Division of
Part I.*

SECTION I

THE MATRIMONIAL CONTRACT IN ITSELF

CHAPTER I.

NATURE OF THE MATRIMONIAL CONTRACT.

ARTICLE 1. Meaning and origin of the matrimonial contract.

48.
Meaning of
Marriage.

I. Meaning.

Marriage (¹) as a contract may be defined : *A contract by which*

1. The Latin word *matrimonium* comes from *matris munium*, the maternal office, because, as TANCRED says, *Summa de matrimonio* (Edit. Wunderlich, Göttingen, 1841), p. 15, « dat mulieribus esse matres ». It is called *matrimonium* rather than *patrimonium*, because, according to Gregory IX, chap. 2, X, III, 23, the infant has more need of maternal than paternal attentions, and the mother bears the burden before birth, the anguish at birth, and the subsequent anxieties.

It is called also in Latin *connubium* or *nuptiae* from *nubere*, to veil, because when newly wedded wives were given over to their husbands, they used to veil their heads as a sign of modesty and submission. (Cf. GLASSON, o. c., p. 169). The word *nuptiae* (nuptials) has the further signification of festivities and solemnities that took place on the occasion of the marriage. The term *nubere* is also frequently employed, and formerly still more so, to signify the consummation of the marriage. Thus the *nupta*, in opposition to the *desponsata*, was a wife already known by her husband, as distinguished from one who was still a virgin (chap. 29, 31, 40, C. XXVII, qu. 2, and ch. 1, C. XXXVIII, 1). The word *connubium*, in the Roman law, usually signified the ability to contract a lawful marriage ; cf. SEHLING, *Die Unterscheidung*, p. 38 ; LAURIN, *Intr. in jus matr.*, p. 26 ; LEITNER, *Lehrb.*, p. 3. Finally it is also called *conjugium* (from *jugum*, yoke) because of the effect produced by the matrimonial contract in joining the man and the woman under the same yoke.

The Flemish *echt*, and the German *Ehe* come from the ancient form *ēwa* : wet, band, (loi, lien). Hence *e-gade* (husband) signifies lawful husband (wettige gade) ; and the act of legitimating (wettigen) a natural child is called *echten*. The German *Trauung*, whence comes the Flemish *trouw*, owes its origin to an ancient German custom : in the celebration of the marriage, the wife was delivered (toevertrouwd) by her father or guardian into the hands of her husband ; at a later period the custom changed, and required that husband and wife should be intrusted to one another. See further on n° 63, in the note, and compare with n° 83.

With regard to the Flemish *huwelijk*, VLAMING, o. c., I, n° 86, in the note,

man and woman are associated and united with one another as a common principle for the generation and education of children.

Explanation :

1. *It is a contract*, an agreement : that is to say, the accord of distinct wills producing a legal effect.

2. *by which man and woman...*: it is a contract of a special nature, requiring not merely the accord of two wills, but the accord of two wills belonging to persons of different sexes.

3. *are associated* : the matrimonial contract is directed to an association that has in view one and the same end.

4. *and united with one another as a common principle for the generation* : in addition to the association thus formed with a view of pursuing the same end with a common purpose, the partners become a *principle physically and morally one* in respect of the same work of generation and education. Procreation is not the act of the man alone, nor of the woman alone, but of the two together. The man and the woman, taken separately, do not constitute two partial principles, producing each, on its own part, a separate share of a composite and divisible effect, but act as a single and common principle of generation (¹).

5. *and education of children*: the work of education of the children does not, indeed, present the same physical unity as that of generation ; and hence results a difference in the manner and unity of action between the respective duties of husband and wife. Nevertheless, as the one obligation necessarily follows from the other, parents are bound to bring up their children precisely for this reason that, as a common principle of generation, they have pro-

explains the origin of the word, after VAN HELTEN, *Tijdschrift voor Ned. Taal- en Letterkunde*, Leiden, XIII, p. 214 s. : « Ons huwelijk » is af te leiden van het oudhoogduitsche *hileih* (middelhoogd. *hileich*), hetgeen eene samenstelling is van *hi* (samentrekking van *hiwo-a*) = maritus en uxor en *leih* of *leihî* = carmen, gezang, gehuich. *Hiwa-leich* is dus in eerste beteekenis : gezang, gejuich, ter eere van het bruidspaar, en werd later metonymice (pars pro toto) voor de geheele bruidsplichtigheid genomen ».

I. The employment of the passive « *conjunguntur* » indicates that the husband and wife are constituted one principle, not only by virtue of the consent mutually given, but also by the act of God, who ratifies and sanctions the consent of the contracting parties, and so confirms the bond induced by the consent.

created them. The business of education, then, belongs to the province of the procreative principle, and is the business of the husband and wife, as constituting this principle⁽¹⁾.

The above definition is based on *Holy Scripture*, which relates the institution of marriage. In fact we learn from *S. Matthew*, XIX, 4, 5, that God has ordained an association, an intimate union : « A man... shall cleave to his wife, and they two shall be in one flesh ». Then the object, the end of this union is set before us, the *propagation* of the species. The same passage of *S. Matthew* clearly intimates this in speaking of the different sex of the partners : » Have ye not read, that he who made man from the beginning, made them male and female?... *For this cause* shall a man leave father and mother, and shall cleave to his wife, and they two shall be in one flesh ». The diversity of sex was ordained by God for the multiplication of the human race, according to Genesis, I, 27, 28 : « God created man...; male and female he created them. And God blessed them, saying : Increase and multiply, and fill the earth ».

Further, the fact that they are constituted not only the principle of the procreation of the offspring, but also of *training it up*, follows as a natural consequence, since the child, when born, calls for proper development of body and mind, which it cannot attain by its own strength⁽²⁾.

Finally, that the union is to be constituted by *contract*, is indicated in the texts quoted, since the association in question is incomprehensible except as a voluntary and fully deliberate union.

This idea of marriage, viz. an association between man and woman *with a view to the propagation of the human race*, is further sanctioned by the common sense of mankind, and is also indicated by the difference of sex of the partners.

1. Cf. MARTIN, expounding more on this, o. c., I, p. 2 ss.

2. « Since the child is one flesh with its father and mother, it ought to be loved and cherished as their own flesh by both of them conjointly, and so it is not only to be brought to life in the first instance, but must also be led on and trained up to the preservation, increase and perfection of life, as it were by a continuous generation, not merely as a being of flesh, but as flesh animated by a rational soul and raised to the higher state of man ». MARTIN, o. c., I, p. 6 ss. ; compare S. THOMAS, *Contra Gentiles*, I, III, c. 122, and 2^a 2^{ae}, qu. 154, art. 2.

Note. 1. Whence it appears that the matrimonial contract joins the parties in the closest union, a union which the *Roman Law* rightly defines as : « consortium omnis vitae, divini et humani juris communicatio » ⁽¹⁾ ; and again : « viri et mulieris conjunctio individuum vitae consuetudinem retinens » ⁽²⁾.

2. This permanent joining of husband and wife as a common principle for the generation and education of children is brought about by the contract, or marriage *in fieri*, and constitutes what is called *the conjugal union*, or marriage *in facto esse*.

II. Origin of the matrimonial contract.

1. The matrimonial contract has its origin in the *natural law*. ^{49.} *Marriage is of a natural* It is in the order of nature that the human race should propagate itself by generation ; and that the infant, once procreated, should not be left to its native powerlessness, but should be formed and educated physically and morally ⁽³⁾.

This education from its nature requires ⁽⁴⁾ the intimate and permanent collaboration of the father and mother ⁽⁵⁾ ; but this in its turn presupposes a positive agreement, inasmuch as there

1. L. I, Dig. XXIII, 2.

2. § 1, Inst., I, 9.

3. « Birth would be to no purpose, if the proper nourishment of the new-born were neglected, for as a rule they would die ». S. THOMAS, *Contra Gent.*, I. III, ch. 122 ; compare 2^a 2^{ae}, qu. 154, art. 2.

4. *Accidentally* it may happen that children may be well brought up without the permanent cohabitation of their parents ; but the nature of things requires certain conditions, and this it is that we have to take into consideration.

5. It is manifest that in the human species, the mother alone could not suffice for the bringing up of the offspring, since the requirements of human life demand much that could not be provided by one alone... Again we must consider that in the human species, the offspring needs not merely nourishment for the body, as in the case of animals, but instruction for the mind as well ; for the other animals have their natural instinct wherewith to provide for themselves ; but man lives by reason, and must come to prudence through long experience. Hence it is necessary that children should be instructed by their parents who have already gained experience, nor are they capable of this instruction as soon as born, but only after a long time, and especially when they have come to the years of discretion. This education takes time, and, since the passions depreciate prudence, repression is called for as well as instruction. The mother alone is not equal to this, and the cooperation of the father, with greater intelligence to instruct, and greater power to correct, is required. It is necessary,

is at the outset no obligation to marry, and consequently each one is at liberty to bind himself to the conjugal life and to its corresponding duty of cohabitation, or to remain unmarried.

and divine
origin ;

2. The matrimonial contract, moreover, owes its origin to God who instituted it, as we learn from the Holy Scriptures.

it is a con-
tract at the
same time
natural and
religious.

Marriage is, then, a *natural* contract, since it is rooted in nature itself, but it is more than a mere secular contract. It is of itself, and quite independently of its sacramental dignity, a *sacred* and a *religious* contract. If we consider only its own distinctive qualities, this contract is sacred and religious, not essentially and intrinsically, but extrinsically : by reason of its divine origin, of its religious signification, since it symbolizes the union of Christ with the Church, and also because of the end for which it is ordained (¹).

* * *

50.

Statement
and refuta-
tion of the
evolutionist
theory, which
gives as ante-
cedents of
actual mar-
riage :

Many **evolutionists** undertake to prove that this doctrine is false. According to them, the marriage contract did not originally exist, and it was only by passing through successive stages that the human race arrived at the present system of marriage. If we are to believe them, the primitive married life, universally and legally recognised, was no other than *promiscuity* between the sexes. Then came marriage by *abduction*, and after that marriage by *purchase*. To confirm their statements evolutionists appeal to traces found in ancient history, and to the customs of certain peoples at the present day, especially of those that are the least advanced.

The well known work of WESTERMARCK, already quoted, explains this theory at length ; also HOWARD, o. c., I, p. 39-223 (²). Thus, with regard to :

therefore, in the human species that, not a short time, as in the case of birds, but a very considerable portion of life should be devoted to the development of the offspring. Thus, since it is necessary in the case of all animals that the male should remain with the female as long as the welfare of the offspring requires it, it is natural in the case of man that this should be not for a brief period, but that the husband should have a lasting union with one and the same wife. This union we call marriage. S. THOMAS, *Contra Gent.*, l. c. ; cf. 2^a 2^{ae}, qu. 154, art. 2 ; cf. also MONSABRÉ, o. c., p. 65 ss.

1. Encyl. *Arcanum*. Cf. also LEMAIRE, o. c., p. 2-13, who gives the testimony of men learned in the law, even of unbelievers. See below, n^o 55.

2. Cf. also BEBEL, o. c. part I, *La Femme dans le passé*, p. 13 s. ; NYSTRÖM, o. c., p. 184 s. ; PEYTEL, o. c., p. 13-31 ; GIRAUD-TEULON, o. c., ch. 1 and 2 ; and others

A. Promiscuity :

1. Westermarck first shows (p. 53-55) that promiscuity has prevailed, and as a matter of fact still prevails in some few and uncivilized countries ; but he observes that many of the facts formerly alleged have since been recognised as false or insufficiently proved, and he adds quite rightly that, even if they are admitted, one cannot logically infer from the existence of promiscuity as a primitive and universal system of marriage : « Même si quelques-uns des récits sont exacts, et s'il y a eu promiscuité dans le commerce entre les sexes, chez quelques peuples, ce serait une erreur d'en inférer que ces cas entièrement exceptionnels représentent une étape de développement humain que l'humanité, comme tout, a dû traverser. En outre, rien ne nous autoriserait à considérer cette promiscuité comme une survivance de la vie primitive de l'homme, ou même comme une marque d'un état très grossier de société. Ce n'est nullement chez les peuples les plus inférieurs que les rapports sexuels s'approchent le plus de la promiscuité » (p. 60).

1. *Promiscuity,*

2. The same author gives (p. 71) several ancient customs that were current in different countries, in which they claim to find traces of primitive promiscuity. But the alleged facts prove nothing. Thus :

a/ The *jus primae noctis* (right of the first night) and the custom of *interchanging wives*, particularly between hosts and guests, are better explained (as far as the alleged facts are really historical) ⁽¹⁾ by the rude tyranny of chiefs, and by a coarse conception of the duties of hospitality.

quoted by HOWARD, o. c., I, p. 46 : these authors assume primitive promiscuity. See also, on the other side, LEITNER, *Lehrb.*, p. 36-58 ; VIOLLET, *Histoire du Droit*, q. 484 s.; FONSEGRIVE, o. c., p. 7-43 ; AVIGDOR, o. c., L. I. ch. I.

1. The *jus primae noctis*, as understood by the enemies of the Church, such as BEBEL, o. c., p. 40 ; NYSTRÖM, o. c., p. 216 ; GIRAUD-TEULON, o. c., p. 32 ss. and others, is relegated by many and the best authorities to the region of fable, at least as far as our countries are concerned. If we are to believe the enemies of our faith, this right of the first night existed in full force in the Middle Ages, and in the heart of a Christian country ; the prince, or even in certain places, the priest, had the right to violate the newly wedded wife on the first night of the nuptials. For the ampler refutation of this anti-historical statement, see SCHMIDT, o. c., particularly p. 365-379.

In a word : among *pagans*, the virginity of young maidens was looked upon as consecrated to the divinity ; this is how the right of destroying virginity by sexual intercourse was to be obtained through the agency of the priest or the prince, acting as delegates of the deity. To secure it, a certain sum was paid ; and this was known as the right of the first night. Among certain peoples, the husband gave his bride, after the first night of the marriage, a pre-

b/ The case of the *matriarchate*, which is the great war-horse of the evolutionists, affords no better proof of their proposition. Under this regime, which as a matter of fact formerly flourished here and there, the child took the name of its mother, and inherited only its mother's pro-

sent as the price of her lost virginity (after the fashion of the *Morgengabe* of the Germans); this custom might also be called the right of the first night.

Among *Christians*, this expression for the most part meant the sum of money or fine paid by husbands in order to obtain, by way of a dispensation, permission to consummate the marriage on the first night, without observing the three days of continence, that was the rule in the Middle Ages, after the example of Tobias. See also SCHERER, o. c., p. 257, note 57; CHARDON, o. c., p. 160. Thus there exists a decree of the Parliament of Paris, of the 19th of May 1409, abolishing this fine for the diocese of Amiens; DE FORAS, o. c., p. 57 s.; DU CANGE, *Glossarium* — supplementum, V^o *Marcheta*.

A symbolical ceremony, in use in the Middle Ages, on the occasion of the marriage of a vassal, has helped to gain credence for the opinion according to which the suzerain really had the right to violate the wife of his vassal on the first night of the marriage. The vassal was looked upon as under the yoke of his suzerain and joined to him as the wife to the husband; hence ancient writings speak of him as the *Ehefrau* of his prince (SOHM, *Das Recht*, p. 61 s.). On her marriage, the newly wedded wife took her place in these quasi-marital relations with the suzerain; this was apparently signified by the so-called occupation of the nuptial bed in the name of the prince. The same symbolical usage was observed on the marriage of a prince by proxy. Cf. DE FORAS, o. c., p. 263; AVIGDOR, o. c. p. 20; and particularly HANAUER, o. c., p. 285 s., compared with p. 255 s. and what we shall have to say under n^o 60. From this there would come certain forms of speech: as *droit de cuissage*, *droit de jambage* (cf. DU CANGE, *Glossarium*, V^o *Marcheta*). At a later date the suzerain replaced this ceremony by the practice of exacting from his vassal, on the occasion of his marriage, a kind of tribute, as a recognition of his seignorial right. This fine, again, went by the name of the right of the first night, especially as the conjugal relations of the first night were considered as completing the marriage. This seignorial right was also called *macheta*, *nuptiaticum*, *bathinodium* (bednood); cf. Du Cange, *Glossarium*, ad hanc verba.

We do not by any means wish to deny the possibility of certain abuses in this matter, even among Christians in past ages. In particular, it would not be surprising if princes and suzerains permitted themselves from time to time something more than a merely symbolical occupation of the nuptial bed of their vassals. Cf. DU CANGE, *Glossarium*, V^o *Marcheta*. What we do deny, is the *jus primæ noctis*, as understood by the Bebel and Nyströms, and represented as a legal institution sanctioned by general use among pagans and Christians of the Middle Ages.

perty (¹). We have here, they tell us, an indubitable trace of primitive promiscuity in the intercourse of the sexes : the regime of the matriarchate supposes that wives were then at the service of each, and consequently it was impossible for the child to know its father.

The answer is easy. Without taking into account the fact that the matriarchal regime never prevailed to any very great extent (²), there are other reasons than that set forth by the evolutionists which might perfectly well have brought the practice into being ; as, for instance, the very close ties that unite the child with its mother, and above all the widespread practice of polygamy. Where polygamy existed, it was natural to distinguish the children born to the same father but by different mothers, by giving them the maternal name. Each wife of the same husband thus constituted for him a distinct family, especially as she frequently had a separate establishment. Moreover, even assuming that uncertainty as to paternity contributed to the introduction of this regime, it is by no means a necessary inference that this was due to promiscuity, since such uncertainty might very well arise from the actual infidelity of the wife, or even from the mere suspicion of it (³).

B. Marriage by abduction (⁴).

There still exist among some few rude tribes certain traces which seem to support this part of the thesis. WESTERMARCK, p. 369, relates that in some countries : « quand la noce est arrangée et les cadeaux payés, le marié saisit la mariée et l'enlève, suivi de ses parents qui font semblant d'essayer de la délivrer » (⁵).

The author thinks, and we share his opinion, that marriage by abduction really existed here and there in ancient times. But he also recognises (p. 372 seq.) that we cannot infer therefrom, that this was a regular phase,

51.
2. marriage
by abduction.

1. See the description of this regime in LEROY, *Religion des Primitifs*, p. 103 s. ; PEYTEL, o. c., p. 24-30 ; GIRAUD-TEULON, o. c., passim.

2. WESTERMARCK, o. c., p. 97-103 ; HOWARD, o. c., I, p. 110-117.

3. Some also invoke as an argument the burlesque custom known as *couvade*, which consisted in this : during the wife's confinement the husband simulated the pains of childbirth, and after her delivery continued to ape the condition of a woman who has given birth to a child. See PEYTEL, o. c., p. 24 s. ; VIOLETT, o. c., p. 384 s. ; GIRAUD-TEULON, o. c., p. 138 ss. ; HOWARD, o. c., I, p. 112.

4. According to the evolutionists this is how marriage by abduction and purchase took the place of primitive promiscuity : certain men, wanting wives of their own, would buy or carry off, as occasion offered, some fair traveller or stranger, and forsake the wives of the clan who belonged to all in common.

5. See in LEROY, *Les Pygmées*, p. 226, the account of a marriage by simulated abduction ; also in HOWARD, o. c., I, p. 164-175.

a legal and universal stage, through which marriage passed. As a matter of fact, few tribes are found in which at the present day they mimic the abduction of the bride; and who shall say if this symbol now in vogue has its origin in actual abduction? Other explanations are possible: it might, for instance, be merely a device for emphasizing the separation that marriage imposes on the woman: she must leave her own people and follow her husband. Cf. also HOWARD, *o. c.*, I, p. 173-179, and p. 119 s.

C. Marriage by purchase.

52. 3. marriage by purchase.

Among most peoples in ancient times there unquestionably existed usages and forms of speech which, at first sight, seem to have originated in the practice of marriage by purchase: the husband buying his bride from her parents.

It is known, for instance, that with the Romans marriage by purchase (*per coemptionem*) was one of the forms in vogue (!); that among the Hebrews Jacob, as we read in the Scriptures, agreed to serve his uncle Laban seven years for Rachel; that in most German-speaking countries we meet with such expressions as: — the marriage price (*witemon* or *meta*); the purchase price; to buy a wife, and so on; we know that the man paid an agreed price to the parents of his bride, or, if he married a widow, to the family of her former husband (2).

Apparently we cannot deny that marriage by purchase, properly so called, really existed of old in certain countries. But it is a far cry from this to the thesis of the evolutionists, who profess to find therein a legitimate and universal phase of marriage. Let us not exaggerate the conclusive force of the customs and forms of speech mentioned above. To be decisive, they would have to mean the actual purchase *properly so called* of the *woman herself*, without leaving any place for mutual consent.

But that is not proved.

1. We do not exactly know whether the price paid and the ceremony of purchase had reference to the acquisition of the bride or of the *mundium*, (3) which, according to the Roman and the German law, passed

1. The Roman law acknowledged two principal forms of marriage: marriage *in manu*, which was at first the only form in use, and marriage *sine manu*. The former (*Manusehe*) caused the wife to pass into the family and power of the husband (or of his father). It could be contracted in three different ways, among others by purchase (*per coemptionem*); in this form the parties went through a symbolical ceremony of purchase and sale in the presence of the *libripens*.

2. Cf. WESTERMARCK, *o. c.*, p. 378-397; LEFEBVRE, *o. c.*, p. 356 seq; SEHLING, *Die Unterscheidung*, p. 1 seq.; VIOLET, *Histoire...*, p. 402 seq.

3. In the German law unmarried women, even those of age, were placed under the guardianship of the head of the family; on their marriage this authority

from the parents of the bride to her husband. The second supposition would seem to be the correct one, at least among the Romans. With them marriage *per coemptionem* was contracted by the simple mutual consent of the engaged parties, and the purchase ceremony affected only the transmission of the right of seignory; this transmission was made by the father of the bride in the hands of the husband, or of him upon whom the husband was dependent ⁽¹⁾.

2. We must not be in a hurry to take *literally* the expressions: *nuptial price, purchase*, and the like. It would seem rather that these terms are to be understood as indicating a return made by the husband for the favour of parental consent: because the parents had thereby given him their daughter, who was their property, and had admitted him into their own family circle. At the most, one can see therein a compensation intended to counterbalance the loss that the parents sustained through the departure of their daughter. It is easy to see how they came to give to the price paid on this occasion the name of nuptial price, and price of purchase, especially as the fixing of it would naturally give rise to a good deal of discussion ⁽²⁾.

It would appear that we must understand in the same sense the form of speech in use among the *Franks*: marriage *par le sou et par le denier*, where we find the trace of the marriage gift reduced to an offering of « *un sou et denier* » ⁽³⁾. The same observation applies to the old Frankish

passed into the hands of the husband. This right of guardianship or seignorial power was called *mundium*; and he who was invested with it was called *mundualdus*. For the etymological origin of the word *mundium*, see ROCHE, o. c., p. 40.

1. STOCQUART, o. c., p. 50 s. FRIEDBERG, *Das Recht der Eheschl.*, p. 17 s. shows the same concerning the German law, viz. that the seignorial power, and not the bride, was the subject of purchase.

2. « Je conçois bien que le pretium nuptiale, au lieu d'être un simple présent purement gracieux et volontaire, ait pu être débattu d'ordinaire entre les familles comme une condition de mariage, et qu'il ait été tarifé même en certaines coutumes germaniques, à défaut d'une convention formelle. Est-ce que l'on n'a pas vu de tout temps (souvent même encore de nos jours), des pourparlers divers d'intérêt, d'où peut dépendre la conclusion du mariage et qui viennent s'adjoindre ou se heurter au sentiment qu'éprouvent les fiancés? Est-ce que les Romains n'ont pas débattu sur la dot, et plus tard aussi bien sur la donatio ante nuptias? Qui a jamais parlé, au point de vue du droit, des mariages par achats et ventes, même au sujet de ceux qu'on voit le plus fortement teintés d'intérêt ou gâtés par l'argent? » LEFEBVRE, o. c., p. 372. The same author, on page 376, gives the text taken from the ancient *Eddas*, where the *gift* and the *purchase* are mentioned together.

3. Cf. LEFEBVRE, o. c., p. 384 s. At a later date, after the example of the

custom of the *reipus* ⁽¹⁾, to which we have already alluded. He who married a widow had to pay solemnly *in mallo* ⁽²⁾ the sum of three *sous* and a *denier* to the family of the former husband.

We content ourselves with merely mentioning the argument brought forward by certain authors as a confirmation of the evolutionist contention, and drawn from the very nature of the ancient *mundium* or seignorial right. According to them ⁽³⁾, women, among the Germans, were entirely under the power of their lord (*mundualdus*), and were regarded as mere objects of merchandise. We turn again to LEFEBVRE (o. c., p. 330-338), and he shows us conclusively that this argument cannot stand, the right of seignory carrying with it no other powers beyond the right of guardianship and the duty of affording protection ⁽⁴⁾.

We may rightly infer that in general, arguments drawn from ancient customs in support of marriage by purchase are not conclusive. SCHEIL (o. c., p. 57 s.) has made the same remark when speaking of the Babylonian customs, and tells us that the *code of Hammourabi* (about 2000 B. C.) contains many provisions that appear at first sight to imply marriage by purchase; that they speak there of a sum of money to be paid by the bridegroom to the father of the bride; but that on closer examination, it is obvious that this ceremony has not the import that some would attribute to it ⁽⁵⁾.

Conclusion. This, then, is the conclusion that we come to. Historical data do not weaken in the least the Christian contention as to the origin of marriage. The contract by mutual consent has been its true form from the beginning;

Franks, the nuptial price became more reduced in the greater part of the Germanic tribes: it was changed into the *dower* bestowed by the *husband* on the *wife*, and was accompanied by a little present called *morgengab*, the gift of the husband to the wife after the first night of the marriage, as a compensation for the loss of her virginity. See LEFEBVRE, o. c., p. 417-428; STOCQUART, o. c. p. 51 s.; cf. below, n° 122, under 4, in note.

1. CARON, o. c., p. 112 s. — SOHM, *Das Recht der Eheschliessung*, p. 63 seq., on the contrary, looks upon the *reipus* as a fine directed against the unlawful re-marriage of *widows*.

2. The *Mallum*, according to FRIEDBERG, *Das Recht*, p. 21, was the *Gerichtsstätte*: the place in which it was customary to celebrate marriages; whence we have the word *Gemahl*, to denote married persons. Other authors, and among them Sohm, reject this interpretation.

3. VIOLLET, *Histoire...* p. 287 s.; 493 s.

4. Cf. PELLET, o. c., p. 62 s.; BERNARD, o. c., p. 48 s.

5. Cf. CUQ, o. c.; CRUVEILHIER, *Le Code d'Hammourabi*, in *Rev. du cl. fr.*, t. LXIX, p. 292 s.

if certain customs have deviated from it, if some still do so, that is not a question of evolution, but rather of degeneration (¹).

ARTICLE 2. End of marriage.

The end (²) that marriage, as such, seeks to attain, that is to say, the end that nature and the Creator assign to it, is no other than *the propagation of the human species*; in other words, the procreation and education of children. The very idea of marriage includes the enunciation of this end. Marriage is in fact an association formed *with a view to the generating and educating of children*. As we have seen, this idea is confirmed by the common sense of mankind and by the very fact that the partners are of different sexes.

53.
The procreation and education of children is the end of marriage,

The propagation of the human species is, then, the end and aim of marriage. It has no other; this end is the *only* end. Undoubtedly marriage brings with it yet something more: affection and mutual support, lawful joys, and a remedy for concupiscence; but the true end of marriage is not there. There we find but means to attain that end, or at the most, and in *no proper sense*, ends that are *essentially subordinate* to the true end (³).

the proper and the only end.

The use of marriage, while allaying the passions, is accompanied with *sensible joy*, so as to give an impulse to the procreative faculty, and thus come more surely to the end in view. The Creator has willed that husband and wife should find in their common life *a mutual comfort and support*, that so stability might be given to that life, and the *education* of their offspring secured. He has

1. See HOWARD, O. C., I, p. 222 s. (also p. 93-110); LICHTENBERGER, O. C., p. 29 s.; LEROY, *Relig. des prim.*, p. 385 s.

2. Where it is a question of the end of marriage, strictly speaking a distinction ought to be made between marriage *in fieri* and marriage *in facto esse*. The end of the act of marrying, of marriage *in fieri*, is properly the conjugal bond itself, or marriage *in facto esse*, since the contract is immediately, intrinsically and essentially referred to this and has its term herein; but, from the fact that the whole contract, as such, tends to and has reference to marriage *in facto esse*, its end may also be ascribed to marriage *in fieri*, and there is no need to distinguish between the end of marriage *in fieri* and the end of marriage *in facto esse*. Cf. MARTIN, O. C., I, p. 50 s.

3. Cf. *Collat. Brug.*, t. VI, p. 469 seq.; t. VII, p. 437 seq. Inasmuch as the allaying of concupiscence and mutual solace are called ends, the propagation of the species shall be called the *primary* end.

willed that this joint life, this dwelling together of father and mother, should be fostered by the warmth of conjugal affection, so that the obligations of the married state might be rendered supportable thereby, and the common task of education more easy (1).

54.

It follows that marriage is 1. impossible between those who are per se incapable of generation,

What follows from the foregoing :

1. Granted the end of marriage, only those who are *in themselves* capable of procreating and bringing up children, are capable of marriage, to the exclusion of all others, as, for instance, eunuchs (2), who, as Sixtus V insists, must not be permitted to marry (3). Marriage, in fact, like every other human act, should tend *of itself* towards the end that nature has assigned to it (4).

and 2. it is unlawful to marry, to the positive exclusion of the generation ;

2. *The object that the parties have in view* in contracting marriage, must be in agreement with the proper end of marriage, at least in *a negative way*. Let us explain our meaning :

a/ *The matrimonial compact itself* may not exclude *in a positive way* the procreation and generation of children. Such a *stipulation* would put the contract in *positive contradiction* to the end for which marriage was instituted, and would render the contract altogether *null* (5). (See below, nos 85 and 88, where we treat of the

x. « The primary end of marriage... cannot be other than the generation and training up of children ; and therefore there cannot be other ends except such as are consequent on this, and are, as it were, necessary means whereby marriage may either simply, or more expeditiously and more perfectly attain its primary end ». MARTIN, O. C., I, p. 64.

2. Below, in the chapter on *impotence*, we shall speak more at length of persons incapable of generation. See also under no 125.

3. Constit. *Cum frequenter*, of the 22 June 1587.

4. That an act may be *accidentally* (*per accidens*) unfitted to attain its end, is of little importance ; for the natural law considers the conditions and qualities that spring from the nature of things (*per se*), and not those that are merely accidental, according to S. THOMAS, C. *Gent.*, l. III, ch. 122.

5. If the intention of having no children does not form an integral part of the matrimonial compact, but is merely subjoined to it, the contract is not null, though ordinarily it is sinful on the part of the contracting parties. Nevertheless this intention may be legitimate, if its direct object is the observance of continency, and childlessness follows indirectly and only as a consequence ; it may even be an act of virtue and perfection, if done through the love of chastity.

placing of a suspensive condition that is contrary to the essence of the contract).

b/ To be the *best possible*, the matrimonial compact should be made with *the positive and explicit intention* of prosecuting the end of marriage (¹).

c/ Nevertheless, in order that the contract may be *simply lawful*, it is sufficient that it should be conformed to this object in a negative way, that is to say, in such a manner as not to exclude positively the act of generation, though without positively intending it. One can, therefore, conscientiously contract marriage with a legitimate intention other than that of having children, provided that this last named object is not excluded. In acting thus, one does not put oneself in positive opposition to the end proposed by God. We will go further and say, that by the very fact of its non-exclusion, the act of generation is implicitly included, and conformity of the matrimonial contract with its proper end is secured (²). From this point of view, then, there is no sin, not even venial, in contracting marriage with the sole explicit (but not exclusive) object of escaping poverty, of finding affection and support, of allaying the passions, or of obtaining lawful enjoyment.

a simply negative exclusion does not involve sin, but imperfection.

Such, then, is our opinion with regard to the end of marriage, and such are the conclusions that follow from it.

On the other hand, those who assign to marriage as *proper and independent ends*, the act of generation, mutual comfort, and the appeasement of the passions, are logically compelled to admit to marriage not only such as positively exclude from their intention the contingency of offspring, but also those who are radically and irremediably impotent, as, for instance, eunuchs. To them also marriage and its use can bring comfort and even the pleasure that they long for (³); and it is sufficient that the act and intention

1. So Tobias junior (*Tob.*, VIII, 9): «Et nunc, Domine, tu scis quia non luxurie causa accipio sororem meam conjugem, sed sola posteritatis dilectione, in qua benedicatur nomen tuum in saecula saeculorum».

The perfection spoken of in the preceding note is obviously not the *perfection of marriage*, as such, that we speak of in the text.

2. See the SALMANTICENSES, o. c., tr. IX, cap. III, P. III, n° 24.

3. Cf. TOPAI, o. c., p. 68 s.; FERRERES, in *Eccles. Review*, t. XLVI (1912), p. 216 s.

safeguard one or other of the proper and independent ends of the matrimonial contract.

This consequence, logically irrefutable, is an additional confirmation of the doctrine which we have advanced as to the *one and only* end (in the strict sense) of marriage.

ARTICLE 3. Honourable nature or morality of marriage.

PROPOSITION. *Marriage is in itself honourable and moral, but less perfect than virginity.*

Proof.

55.
Marriage is
in itself hon-
ourable and
holy on divers
grounds, by
reason of its
end,

First point. *Marriage considered in itself*, abstracting from the sacrament, is not only honourable, but praiseworthy and invested with true dignity.

This follows from the very end for which it was instituted : it conduces « not only to the propagation of the human race, but to the bringing forth of children for the Church, fellow-citizens with the saints, and the domestics of God (Eph., II, 19) ; so that a people might be born and brought up for the worship and religion of the true God and our Saviour Christ (Catech. Rom., P. II, c. VIII, par. 15) » (1).

by reason of
its divine in-
stitution,

The dignity of marriage is *confirmed* by its origin, for *God himself instituted it*, as we have seen above ; cf. Gen., I, 27, 28 ; and II, 18, 23, and compare with Matth., XIX, 6, and with the Council of Trent, Sess. XXIV, cap. unic.

Moreover, Our Lord « ennobled the marriage in Cana of Galilee by His presence, and made it memorable by the first of His miracles (St. John, II) ; and for this reason, even from that very day, it seemed as if the beginnings of new holiness had been conferred on human marriages » (2).

by reason of
its representa-
tion of the
mystical uni-
on of Christ
with the
Church.

Finally, the dignity that belongs to marriage, according to the rescript of St. Leo to Rusticus, Bishop of Narbonne (458-459), is deduced from the fact that « the matrimonial union has been constituted *from the beginning* in such a manner, that, beyond the sexual intercourse, it contains within itself the *sacrament* (in

1. Cf. Encycl. of Leo XIII, *Arcanum*.

2. Cf. the same Encyclical.

a less strict sense), that is to say the symbol, *of Christ and the Church* ; Migne, LIV, col. 1204 s.

Marriage, indeed, considered in itself, in the intention of the Creator, symbolizes for all time, and in the following manner, *the union of Christ with the Church* :

a/ in the first place, Eve formed and issuing from the side of the sleeping Adam, was a figure of the Church issuing from the side of Christ, the second Adam, dead upon the Cross ;

b/ in the second place, a man is joined to his wife in such a manner as to constitute with her a single principle for the generation and education of children, just as Christ unites the Church to Himself, that thereby men may be born to the divine life, and educated and perfected therein in every way through the joint action of Christ and His Church ;

c/ in the third place, in the conjugal life precedence belongs to the husband, even as Christ is the head of His Church, the Saviour himself the head of His mystical body ;

d/ in the fourth place, a man must love his wife, as Christ loved, and loves His Church, and delivered Himself up for it ;

e/ finally, husband and wife become but one flesh, as Christ, by His Incarnation, is united with the Church, His Spouse, so as to establish a participation of nature (¹).

These considerations are amply sufficient, to show the eminent dignity of marriage considered in itself, that is to say, *in its natural aspect*. If, in addition to this, we regard its status as a *sacrament* of the New Law, we see it invested with a merit and dignity far greater still, for Christ has thereby brought to its full height the initial sanctity of the matrimonial contract. « Christ our Lord raised marriage to the dignity of a sacrament ; to husband and wife, guarded and strengthened by the heavenly grace which His merits gained for them, He gave power to grow in holiness in the married state ; and making marriage in a wondrous way an example of the mystical union between Himself and His Church, He not only perfected that love which is according

1. The first four considerations show the symbolical signification of marriage not consummated, that is to say, the union of Christ with His Church by love and common action ; the last has relation to marriage consummated, which signifies in a special way the corporal union, so to speak, of Christ with His Church through the Incarnation. See below, n° 60.

to nature, but also strengthened the natural union by the bond of heavenly love ». Encyclical *Arcanum*.

Confirmed by
the Scriptures
and the
Fathers.

The *Holy Scriptures* ⁽¹⁾ on many occasions extol the dignity of marriage ; and the *Fathers* unanimously defend it against the errors of the Eustathians ⁽²⁾, of the Priscillianists ⁽³⁾, and especially against those of the Gnostics and the Manicheans, who, in accordance with their erroneous dualistic conceptions condemned marriage ⁽⁴⁾. Moreover, marriage has always been in honour in the Catholic Church ⁽⁵⁾ and among Christian people ⁽⁶⁾ : this has been groundlessly denied by *Luther*, who reproaches the Catholic Church with having vilified marriage, and having censured it as a mischievous state ⁽⁷⁾.

1. 1 Cor., VII, 9, 28, 36, 39 ; 1 Tim., IV, 1-3, and V, 14 ; Eph., V, 22-32 ; Heb., XIII, 4. Cf. also LEITNER, *Lehrb.*, p. 23 s.

2. Synodus Gangrensis (about the middle of the 4th century), can. I, in HÉFELÉ-LECLERCQ, O. C., I², p. 1029.

3. Synodus Bragensis (563), can. II, in HÉFELÉ-DELARC, O. C., III, p. 555 ss.

4. The Gnostics believed that matter was created by the Demiurge, or evil principle, and was opposed to the spirit created by God. Consequently, some of them condemned marriage and sexual intercourse in order to put an end to the evil involved in the propagation of the human race ; while others, on the contrary, taught that it was necessary to overcome the flesh and its concupiscence by plunging into pleasure until all desire was extinguished ; these, equally with the former, rejected marriage with its limited pleasures. Cf. CLEMENT OF ALEXANDRIA, I. III *Strom.* (Migne, VIII, col. 1098 s.) ; and PROBST, *Sacramente* p. 428-434.

5. The Church had to defend the honour of marriage against the Albigenses, who, as is well known, reprobated marriage and the marriage act. This may be seen in J. GUIRAUD, *Questions d'Histoire et d'Archéologie chrétienne*, Paris, 1906, p. 65-86.

6. FALK shows this at length (O. C., p. 12-69) with special reference to the Middle Ages. He examines popular writings, institutions, and historical facts that make it apparent in what honour marriage was held. Among other interesting points, he relates (p. 18 seq.) that in many places a custom existed of setting at liberty one who had been condemned to death, in order that he might marry a maiden who freely offered herself for that purpose. See also GRISAR, *Luther*, II, p. 484 ss.

7. Cf. GRISAR, *Luther*, II, p. 482 ss., where is given the text of Luther's accusation, that the Church set forth marriage and its use as « Hurenwerk ».

As regards Luther's *own teaching on marriage* : On the one hand, in the years immediately following his defection, especially before 1520, he still acknowledged that virginity excelled the married state (GRISAR, I. C., p. 203 ss.) ;

In the psalm *Miserere* man is, indeed, said to have been conceived in iniquities ; but catholic interpreters for the most part understand by that, original sin, in which all are conceived. Those who, like BAETGEN⁽¹⁾, interpret the iniquity and the sin as having relation to the act of procreation, conclude that guilt is here spoken of as being, not in the conjugal act *as such*, but inasmuch as that act was, in this case, stained by *adultery*, and they are of opinion that the psalmist is here lamenting that he was born of adultery.

Second point. We observe in the first place, that, in the comparison we are making, we are speaking of the *virtue* of virginity, that is to say, of virginity « that does not refrain from pleasure as such, out of mere insensibility, but from venereal pleasure only, for a supernatural end, and in accordance with the dictates of right reason »⁽²⁾ ; as, for example, for the purpose of being able to devote oneself more freely to the contemplation of divine things. We observe in the second place that the comparison is not to be made between virginity and marriage with respect to such or such a person and in such determinate circumstances, but between the *state* of virginity and the *state* of marriage *considered in themselves*,

56.
The state of marriage considered in itself is less perfect than that of virginity.

subsequently, in conformity with his principles concerning the corruption of nature and original sin, and in order that he might justify his desire of marriage and indulge the heat of his passion, he insists on the irresistible impulse to marry, and the impossibility of continency, except by something very like a miracle, and extols marriage as the gift of God, as a spiritual state, deriving its dignity from the fact it provides a remedy for concupiscence, constitutes the foundation of society, and signifies the union of Christ with the Christian body (l. c., p. 217). On the other hand, in order that he might with greater effect deny to marriage its sacramental nature, and transfer its jurisdiction from the Church to the State, with his accustomed exaggeration, he insists that it is to be looked upon as a profane and worldly thing (l. c., p. 216 ss.). Moreover, while theoretically extolling marriage, practically, in his way of speaking, he frequently treated it with great disrespect, by speaking ill of woman, and lewdly describing the married life. But this must be attributed to the heat of lust, unextinguished by marriage, rather than to a change in his ideas. Cf. GRISAR, l. c., p. 218 ss., and compare with pp. 492 and 506-510.

Cf. also FRIEDBERG, *Das Recht*, p. 157 ss. ; *Realencykl.*, t. V, p. 192-194 ; CHRISTIANI, *Luther et Luthéranisme*, Paris, 1908, 7^e étude ; PAQUIER, *L'État religieux et le mariage d'après Luther*, in the *Rev. cl. fr.*, t. LXVI (1911), p. 385-417.

1. *Handcommentar zum Alten Testament*. — *Die Psalmen*, 2nd ed., 1897, Göttingen, p. 148.

2. Mgr. WAFFELAERT, *De Virtutibus cardinalibus*, tract. I, l. III, n^o 125.

that is to say, in a formal sense, and in accordance with the qualities proper to each state (¹).

Having premised this, we assert that *marriage* is undoubtedly less perfect than virginity, and that the Council of Trent, Sess. XXIV, rightly reprobated the error of those who say : « that the married state is to be preferred to the state of virginity or of celibacy; and that it is not better and more blessed to remain in virginity or celibacy than to marry » (²).

Proofs.

Proofs. Without enlarging upon the clear evidence of the Holy Scriptures, more especially Matth., XIX, 10, 11, 12., and 1 Cor. VII, and omitting the almost innumerable passages from the Fathers that support our assertion, we shall confine ourselves here to *arguments supplied by theological reasoning* only.

1. The good of the *soul* is higher than the *good* of the body, as St. Thomas teaches, 2^a 2^{ae}, qu. 152, art. 4 ; but virginity tends to the good of the soul, while marriage tends to the good of the body, that is to say, to the material multiplication of the human race.

2. Marriage renders a man *less fitting* and less disposed to *the service of God*, seeing that he gives himself up to the pleasures of sense, which, more than anything, draw the mind away from prayer and spiritual things ; and is involved in a multitude of material and worldly cares : « married people are occupied with pleasing one another, with maintaining a good position in the world for themselves and their families, with amassing wealth for their children ; and we see them at times so absorbed in these

1. « Although virginity is better than conjugal continency, nevertheless, a married man may be better than a celibate, even from the point of view of chastity, if the married man is more ready to observe virginity, where the necessity arises, than he who is in fact a celibate. Whence St. Augustine in writing to a virgin says : I am not better than Abraham, but the chastity of the celibate is better than the chastity of marriage ». St. THOMAS, 2^a 2^{ae}, qu. 152, art. 4, ad 2^m ; and C. *Gent.*, l. III, ch. 138.

2. The Council of Trent levels this especially against the Protestants, who in conformity with the later opinion of Luther, extolled marriage and placed it above virginity, looking upon the former as a higher religious state than the latter.

As to the opinion of *the Anglicans* on marriage, its reference to virginity, and also the enpediency of sacerdotal celibacy, cf. HOWARD, O. C., I, p. 392-399.

pursuits, that they can hardly find one half-hour in the week to give to the service of God (¹) ».

3. The act *proper* to marriage is the *act of generation*. But :

a/ this act, as Lessius says (l. c.), appertains to the *less noble part of man*, wherein he approaches nearest to the brute creation, while virtuous continency and abstinence from the pleasures of the flesh belong to the spirit, the noblest part of his being, and make him like to the angels. Whence St. Augustine says (²) : « virginalis integritas, et per piam continentiam ab omni concubitu immunitas, angelica portio est, et, in carne corruptibili, incorruptionis perpetuae meditatio » ; and our Lord himself has said : « in resurrectione neque nubent neque nubentur, sed erunt sicut Angeli Dei in coelo (³) ».

b/ In the act of sexual intercourse *reason is sunk in passion* ; and this is why, apart from the motive given above under a/, on such an occasion one is ashamed of any witness ; for it is indeed shameful for reason « to be so overcome by carnal pleasure, as to lose itself and its authority ». LESSIUS, *ibidem*.

Let us now turn to the common **objections** :

1. The *first* and principal objection is that given by St. THOMAS, l. c., ad 3^m, viz., *the general good is preferable to the private good* ; but marriage is for the general good, that is to say, for the multiplication of the human race, while virginity is of advantage only to the individual. —This objection is answered by the following distinction made by the holy Doctor : the general good is preferable to the private good, *if they belong to the same genus*, but not otherwise, as is the case in the present instance ; for marriage concerns corporal good, virginity spiritual.

If the objection is *further maintained*, and it is claimed that marriage also makes for the spiritual good, inasmuch as it is its business to bring up children for the glory of God, we *reply* that, as already stated, the comparison must be made between *the proper qualities and distinctive marks* that differentiate virginity and marriage. Now, the property of marriage, as compared with virginity, is to provide for the corporal being and well-being of the child. Moreover, virginity is not purely a private good. To the general spiritual good it contributes not less, but rather much more, than

57.
Objections
answered.

1. LESSIUS. *De justitia et jure, cacterisque virtutibus cardinalibus*, l. IV, ch. II, dub. 15 ; 1 Cor., VII, 33 ss.

2. *De Sancta Virginitate*, c. 13. Migne, XL, col. 401.

3. Matth., XXII, 30.

the married state, even in the business of the bringing up of children. It makes a man eminently fit for the instruction and religious education of the young, and for assisting them in all their spiritual necessities, as daily experience proves in the case of secular priests, and in that of religious of both sexes (¹).

2. It may also be objected, that under the Old Law it was reckoned a disgrace to be without children, according to the saying: « *Cursed is he who leaves not children in Israel* ».

We reply that the objection falls to the ground, if we assume that, *presupposing marriage*, the disgrace consisted in the sterility. « Since God had promised to those who lived in marriage blessing and fruitfulness, on condition that they kept the law of God, there was a suspicion that they who had no children, were punished by God as transgressors of the law, and in this there was certainly great disgrace » (²). If, on the other hand, we must sometimes take the saying *absolutely* under any hypothesis, (as in the case, perhaps, of Jephthe's daughter bewailing her virginity), the misfortune and disgrace were not the effect of the state of virginity, *as such*, but resulted rather from the peculiar circumstances of the Jewish people, no one of whom could, without marriage, entertain the hope of having the distinguished honour of numbering the Messiah among his descendants.

3. Certain objections of a *physiological* nature are also sometimes raised. It is asserted that absolute continence exposes the unmarried, the man especially, to continual troubles of the flesh; and is a danger to his bodily and mental health, in consequence of the superabundance of sperm (³).

The answer is easy. Firstly, the seminal secretion diminishes with those who observe continence; and the excess is in part reabsorbed, and goes to vitalize the mind and body, while the rest is spontaneously thrown off by nocturnal pollution (⁴). Secondly, concupiscence is weakened little by

1. Virginity also contributes, as BILLOT rightly remarks (o. c., II, p. 363 s.), to the common good of society: « in the first place because it continually calls to mind our heavenly country, in which 'they shall neither marry nor be married'...; secondly, because it shows how one may curb those unruly passions, which ordinarily are the great stumbling-block of marriage itself; and finally, because it disposes a man to the contemplative life, and gives him a taste for assiduous prayer, that brings down divine blessings on the human race ».

2. BECANUS, *Analogia Veteris ac Novi Testamenti*, ch. XXI, n. 7.

3. Cf. TREUB, o. c.; NYSTRÖM, o. c., chap. 3: *Die Geschlechtbedürfnis und die Enthalsamkeit*. See also GRISAR, *Luther*, II, p. 199-203, on the various sayings of Luther, who declared continency impossible and against nature, and pretended that the use of marriage was every bit as necessary as eating and drinking.

4. Cf. LEITNER, *Lehrb.*, p. 12 ss., who clearly demonstrates, against the Protestants, that virginity and celibacy are not in the least injurious to vigour of body

little with those who manfully refrain from venereal pleasures, so that the celibate, who does not neglect supernatural means, overcomes the assaults of the flesh, and restrains himself more readily than the married man who makes use of marriage with moderation ⁽¹⁾.

Observation. As concerns the question of *precept*, we have to observe that marriage is of obligation for the human race taken collectively; for the end proposed by the Creator, the propagation of the human race, may not be evaded. As far as *individuals* are concerned, it is not of obligation *in itself*, but it may be so *accidentally*: that is to say, it may happen that one or another, by reason of the peculiar circumstances in which he finds himself, may be bound to marry; for instance, in order to allay the excessive force of his passions, to legitimate a child that has been born to him out of wedlock, or to make reparation for the wrong done to the mother; or again, to prevent an excessive shortage of births; in this case, however, one would be bound to marry, not as an individual, but only as a representative of the community.

58.
Marriage is
not of precept
for individuals,
except
accidentally.

Protestants controvert this doctrine, but to no purpose. They object the words of Genesis, I, 28 : *Increase and multiply*. But these words imply rather a blessing than a precept; or, if they contain a precept, they affect, not individuals, but the community, as represented by our first parents. Nor let it be said that the end proposed by the Creator is liable to be frustrated, if the obligation binds not the individual, but only the community. As experience proves, the promptings of concupiscence and the force of natural inclination are amply sufficient for the attainment of the proposed end ⁽²⁾.

and mind, and do not lead to misconduct. See also ESCHBACH, *Disputationes*, p. 471-481; FRANCOTTE, O. C., p. 15 ss.; *De Katholiek*, 1904, p. 303 ss.; *Die Ehe*, p. 81 ss.; FOREL, O. C., p. 468; GEMELLI, O. C., pp. 64-68; LOSLEVER, O. C., p. 219 ss.

1. Cf. ESCHBACH, O. C., p. 482-484, where he adds : « What we have so far said, is true in ordinary cases. But we freely admit that it is not given to all to take the word of the Lord extolling celibacy, and that there are men of an erotic temperament to whom the use of marriage is morally necessary for health of soul and body. To these the words of St. Paul apply : It is better to marry than to be burnt ».

2. The proverb : « Quod omnes tangit, neminem angit » (everybody's business is nobody's business), is true where it is a question of a *burden*, but not where the attraction of individual pleasure is concerned.

CHAPTER II.

THE CONSTITUENT ELEMENT OF THE MATRIMONIAL CONTRACT, OR CONSENT.

ARTICLE 1. Matrimonial consent in general.

FIRST PROPOSITION : *Mutual and actual consent to the matrimonial bond constitutes by itself the contract of marriage, to the exclusion of the conjugal act.*

Explanation.

59.
The matrimonial contract requires consent,

A. There *must be* an actual consent, that is, a consent *de prae-senti*, relating to the contracting of marriage in the present : consent relating to *the future*, as we have seen above, can only constitute betrothment. The necessity of this consent is absolute, and nothing can make good the want of it. This is affirmed by Pius VI, in his Letter of the 11 July 1789 : « This contract differs greatly from any other merely civil contract in this, that in a civil contract the absence of consent may sometimes, for certain reasons, be supplied by the law, but no human power can do this in the case of marriage » (1).

which is of itself sufficient.

B. Mutual consent *is sufficient, and sufficient of itself*, provided it has the requisite qualities, as we shall explain below in the second proposition, and provided also it is given in the form required for its validity, as will be shown in article 2. Besides this consent, sufficient in itself, another element might be required by the positive law, but we shall show that this is not the case, and in particular that sexual intercourse does not constitute, in positive law, a constituent element of marriage.

Proofs.

Demonstration.

1. *The evidence of the Fathers.* St. AUGUSTINE, *De nuptiis et concupiscentia*, l. I, chap. II, says : « She (the Blessed Virgin) was call-

1. Cf. St. THOMAS, *Suppl.*, qu. XLV, art. I. « One cannot receive power over that which is the free property of another, except by his consent ; but marriage gives to each of the parties power over the body of the other... while before marriage each had the free possession of his own body ; it is, therefore, the consent that constitutes the marriage ».

ed spouse from the moment that she plighted her troth, through her husband knew her not, and was not to know her. The name of spouse did not cease to be hers, nor was it wrongfully assumed, though the marriage act was wanting in the past as in the future » (1). St. AMBROSE, *De Institutione Virginis*, ch. 6, writes : « From the instant that marriage is contracted, it rightly bears the name of marriage ; it is not the subsequent loss of virginity that constitutes the marriage, but rather the matrimonial contract ; the marriage exists from the time of the union, and not merely from the commencement of carnal intercourse » (2). PSEUDO-CHRY-SOSTOM, *Opus imperfectum in Matth.*, hom. XXXII (3), says : « it is not carnal intercourse that constitutes marriage, but consent » (4).

2. *The rescript of Pope NICHOLAS I in reply to the petition of the Bulgarians* (866), ch. 3, given by Gratian, ch. 2, C. XXVII, 2, speaks thus : « Let the mutual consent of the parties concerned alone suffice, provided it has the requisite qualities. If that alone is wanting, all the rest, including even carnal intercourse, is valueless » (5).

3. *The Penitentials* teach that marriage is validly constituted without the intervention of sexual intercourse. See the different chapters quoted by WASSERSCHLEBEN, o. c., p. 290, 577, 640, 641 ; and compare with SEHLING, *Die Unterscheidung*, p. 38, note 2.

4. The conception of marriage in the *Roman law* : which, as is well known, has often been adopted by the Church in this matter. According to the Roman law, consent constituted marriage without the intervention of sexual intercourse, and even, though some authorities think otherwise, without the solemn procession conducting the bride to her husband's house. See l. 11, D, XXIII,

1. This text is quoted in the *Decree* of Gratian, 9, Causa XXVII, qu. 2.

2. Taken from the same *Decree* of Gratian, 5, C. XXVII, 2.

3. *Migne*, LVI, col. 802 ; cf. note of FRIEDBERG, to 1 and 4, C. XXVII, 2 ; BARDENHEWER, *Patrologie*³, Herder, 1910, p. 310 ; *Der Katholik*, 1908, II, p. 309.

4. As to the interpretation of the Fathers in the sense of copulatheoria, cf. WATKINS, o. c., p. 116 ss.

5. *Migne*, CXIX, col. 980. See also the letter of Leo I to the Bishop of Narbonne, *Migne*, LIV, col. 1204-1205 ; HARDOUIN, o. c., I, col. 1762.

tit. 2 ⁽¹⁾ ; l. 15, D, XXXV, tit. 1 ⁽²⁾ ; and l. 30, D, L, tit. 17 ⁽³⁾.

5. The *common opinion*, that admits the existence of a true marriage between the Blessed Virgin and Saint Joseph ⁽⁴⁾.

6. *The doctrine of the Council of Florence*, which teaches that the efficient cause of marriage is mutual and actual (*de praesenti*) consent ⁽⁵⁾ ; as well as that of *the Council of Trent*, which declares that the sacrament of matrimony is constituted by the contract itself, and is in no way distinct from it, and that marriage not consummated is true marriage.

7. *The Catechism of the Council of Trent*, P. II, ch. VII, where we read in paragraph 8 : « In order that a marriage may be a real one carnal intercourse is not required ».

* * *

60.
An account of
the copulathe-
oria.

This teaching is opposed by those who hold the *copulatheoria*, which appears to owe its origin to Hincmar of Rheims. According to this theory *marriage is contracted by carnal intercourse, or rather if it is begun by consent, it is perfected by the conjugal act* ⁽⁶⁾. In other words, marriage

1. « Betrothment, like marriage, is contracted by the consent of the parties ».

2. « Cum fuerit sub hac conditione legatum : si in familia nupsisset, videtur impleta conditio statim atque ducta est uxor, quamvis nondum in cubiculum mariti venerit ; nuptias enim non concubitus, sed consensus facit ». From this text it is clear that marriage exists independently of carnal intercourse, and of the entrance of the wife into her husband's house ; but these two facts constitute a *presumption that the consent has been given*. Cf. also SEHLING, *Die Unterscheidung*, p. 14 ss. ; FRIEDBERG, *Das Recht*, p. 5, and especially DESFORGES, o. c., p. 37-57.

3. « Nuptias non concubitus sed consensus facit ». Cf. DARENBERG ET SAGLIO, o. c., V° *Matrimonium*, III², p. 1659.

4. The validity of the marriage of the Blessed Virgin with Saint Joseph ought, in truth, to be judged in accordance with the principles of the Jewish law ; but as the Fathers have rather considered it from the point of view of ecclesiastical law regulating Christian marriage, we may well make use of their evidence here : which is not sufficiently taken into account by WATKINS, o. c., p. 121 s.

5. « Causa efficiens matrimonii *regulariter* est mutus consensus per verba de praesenti expressus ». Note here, that the word « *regulariter* » does not refer to the consent in such a way as to imply that marriage might exceptionally be contracted without consent, but refers to the method of making known the consent, which regularly and ordinarily consists in the utterance of the words.

6. In this theory, therefore, sexual intercourse may be regarded either as the sole element that constitutes *marriage in its entirety*, or as an essential element that *completes and perfects* marriage already begun by consent. It is open to question

contracted by mutual consent alone is not a true and complete marriage ; it becomes such only through sexual intercourse, which alone gives it the dignity of a sacrament ⁽¹⁾, and renders it indissoluble ⁽²⁾ ; before sexual intercourse takes place the marriage is only in its inceptive stage ; it is still dissoluble ; and the parties should still be regarded rather as betrothed than as actually husband and wife ; they become such in fact only after intercourse.

This theory was formerly defended by many celebrated authors, and among them by Regino Prumensis († 916) and Algerus of Liège († 1130). At a later period it became general in the school of Bologna, especially after it had been publicly maintained by GRATIAN, in the *Decretum*, quaestione 2^a, Causa XXVII. This author, after giving the arguments for and against it, decided in favour of the *copulatheoria*, but under a reservation that we shall notice later.

*Supporters of
this theory,
and their
arguments.*

These are his reasons : a/ In chapters 16 and 17 he appeals to the authority of St. Augustine ⁽³⁾ and of Pope Leo I, in his rescript to the Bishop of Narbonne, already referred to, the text of which he gives, but in an adulterated form : « Cum societas nuptiarum ita a principio sit instituta ut, praeter commixtionem sexuum, *non* habeant in se nuptiae Christi et Ecclesiae sacramentum, non dubium est illam mulierem non pertinere ad matrimonium in qua docetur non fuisse nuptiale mysterium » ⁽⁴⁾.

if *Hincmar* held the former opinion, though *Fahrner* and *Sehling* speak of him as doing so. We think the contrary much more probable, and agree therein with *SCHRÖRS*, o. c., p. 216 ss., who brings many texts in support of his statement. However that may be, the less rigid opinion is the one maintained by the doctors of Bologna, as we shall presently point out. In following this course they took a middle way between the extreme opinion, attributed by some to *Hincmar*, and the teaching of the Roman Church, according to which consent constitutes marriage without the *copula*.

1. Without the conjugal act, they said, there was no symbol of the union of Christ with the Church, of that corporal union which our Lord, so to speak, contracted with it by His Incarnation.

2. *Hincmar*, an ardent defender of the indissolubility of marriage, found in his system a solution of the difficulty that existed of reconciling the principle of indissolubility with the practice of the Gallican Church, in dissolving marriage on the grounds of impotence.

3. « Non dubium est illam mulierem non pertinere ad matrimonium, cum qua docetur non fuisse commixtio sexus ».

4. The authentic text, according to *MIGNE*, l. c. ; *HARDOUIN*, l. c., and *FRIEDBERG*, on this passage, says exactly the contrary : « Cum societas nuptiarum ita ab initio constituta sit ut, praeter sexuum commixtionem, haberet in se Christi et Ecclesiae sacramentum, non dubium est... »

b/ In chapters 19-21 he gives *the different cases* in which it has been permitted to dissolve marriage that has not been consummated, whether on account of a vow of religion, or on account of impotence : whence he concludes in the *Dictum* ⁽¹⁾ on chapters 28 and 29, that between parties united by consent alone, there is no marriage, that is, no perfect marriage, just as he denies that the Blessed Virgin and Saint Joseph were really married.

c/ *He interprets in his own sense the evidences that seem unfavourable to his thesis*, and gives them in ch. 1-15. He holds that if the condition of marriage is attributed to a union formed by consent alone, it is attributed to it only as an *inceptive* marriage, and not as a marriage perfect and properly so called. « It must be known, » he says, « that marriage commences with mutual consent, and is made perfect by carnal intercourse ; whence it follows that the consensual contract produces marriage indeed, but only inceptive, while the conjugal act brings into being marriage that is ratified (*ratum*) ⁽²⁾. He maintains that if the texts quoted give to parties, who have contracted by consent alone, the title of husband and wife, they do so « only in anticipation of what is to follow, and not in virtue of the contract already made » ⁽³⁾. With regard to the quotation from pseudo-Chrysostom, given above, which declares that it is not carnal intercourse, but consent, that constitutes marriage, Gratian claims that it is to be understood in the following sense : « sexual intercourse without the intention of contracting marriage, and the loss of virginity without the conjugal compact do not constitute marriage ; but the antecedent intention of contracting marriage and the preliminary conjugal compact give reason to say that the woman, at the moment that she is deprived of her virginity, or is carnally known, is married to her husband, or contracts marriage » ⁽⁴⁾.

The *reservation* which, as we have said, Gratian makes in his theory, is explained in the following chapters of his work, up to ch. 50 inclusively. Though he does not admit the woman who is bound by matrimonial consent alone, is united in the bonds of a true and complete marriage, yet he does not allow her to retract and marry another under all circumstances. *He excepts two hypotheses* : 1. in case of abduction, the woman must be restored to her former husband, and remain faithful to him ; 2. if her husband has already taken her into *his house*, and they have received *the veil and the blessing* together, she can no longer change her mind :

1. The *Dicta* of Gratian are the conclusions that he regards as deducible from the texts quoted, and as contained in them.

2. *Dictum* on ch. 34.

3. *Dictum* on ch. 39 and on ch. 45.

4. *Dictum* on ch. 45.

« the rupture in that case would violate the blessing that the priest gives to the bride ⁽¹⁾ ». *Dictum* on ch. 50 ⁽²⁾.

The distinction between inceptive and complete marriage was preserved by the *disciples of Gratian* ⁽³⁾, who stated it with yet greater precision, and accorded the benefit of indissolubility to such marriage only as had been completed by conjugal intercourse, while they permitted inceptive marriage to be dissolved for a variety of reasons, that may be found in ESMEIN, o. c., I, p. 117, such as, a vow of chastity, captivity, the super-vention of spiritual relationship or affinity, and even, according to many of them, a subsequent consummated marriage ⁽⁴⁾.

The *copulatheoria* was *opposed*, among others, by Peter Damian, William de Campellis, Hugh of St. Victor, and above all by *Peter Lombard* ⁽⁵⁾. In *Opponents of the theory.*

1. It appears, then, that Gratian introduced this exception in favour of a marriage that had been blessed, though not consummated, out of respect for the blessing given. The later Decretists relied rather on the fact that the wife, in the case proposed, had already been taken into the house of her husband, which in their eyes, by analogy with the Roman law, completed the marriage that had been begun. Cf. ESMEIN, o. c., p. 114 and 118.

2. Chapter 51, which expounds a doctrine quite at variance with the views of Gratian, is a *Palea*, that is to say, a text that does not belong to the *Decretum* as it left the hands of Gratian, but was added by a later writer. Cf. FRIEDBERG on this passage.

3. Cf. FREISEN, o. c., p. XXVIII-XXXIV.

4. This last reason was not admitted by Roland, afterwards Alexander III.

5. The opinion of Gratian is set forth by Peter Lombard in the work known as *Sententiarum libri quatuor*, l. IV, Dist. XXVII, F., G., H., almost in the very words of the *Dictum* to ch. 45, whence it seems quite clear that the writing of Lombard is of a later date than that of Gratian: « Nevertheless there are some who assert that there is no true marriage before the transference of the bride and the occurrence of the *copula*, and that none are truly married until sexual intercourse has taken place; but that the plighting of their troth leaves them merely betrothed and not married... The authorities on which we rely in asserting that consent constitutes marriage, are interpreted by them as meaning, that the consent or conjugal agreement constitutes the marriage, not before sexual intercourse, but in it. For as the defloration of a virgin does not constitute marriage, unless the conjugal compact precedes it, so neither does the conjugal compact, before the conjugal connection takes place. In virtue of the conjugal compact, therefore, they become betrothed parties before sexual intercourse, but husband and wife in it. For the conjugal compact brings it to pass, that she who before was betrothed, in the act of sexual intercourse becomes a wife ». Cf. P. FOURNIER, *Deux controverses sur les origines du Décret de Gratien*, in the *Rev. d'Histoire et de Littérature religieuse*, 1898, p. 111 ss.; DE GHELLINCK, *Théologie et droit canon au XI^e et XII^e siècle*, in *Études*, t. CXXIX (1911), p. 193.

opposition to the School of Bologna, these authors insisted on the evidence quoted above in favour of the principle of the earlier theological authorities : viz., that consent, not carnal intercourse, constitutes marriage ; and moreover directly refuted the arguments brought forward by their opponents. Without speaking of the first text invoked by Gratian, and attributed to St. Augustine, but nowhere to be found in the writings of the holy Doctor ⁽¹⁾, and passing over the text of St. Leo I to Rusticus, which was, as we have seen, adulterated, the reasoning of the Master of the Sentences is as follows :

1. He vindicates the sacramental character of marriage, even where it is without the conjugal act. He distinguishes a two-fold union of Christ with the Church, the one corporal, the other spiritual effected through will and love. This second or spiritual union symbolizes marriages contracted by consent alone ⁽²⁾.

2. With regard to the authorities invoked by Gratian in favour of the dissolubility of marriage not consummated, Peter Lombard interprets their utterances in accordance with the distinction made by William and by Hugh of St. Victor between *sponsalia de praesenti* and *sponsalia de futuro* ; that is to say, between the compact relating to future marriage and the consent relating to actual marriage, and contends that the causes of dissolubility are applicable to the former only, and not to the latter ⁽³⁾.

1. Friedberg thinks that this text was the *summa* of the following chapter 17.

2. « As there are between married persons the union of mind and the union of body, so there is also between the Church and Christ a two-fold union, the union of will, since the Church wills what Christ wills, and the union of nature inasmuch as Christ has become man. Thus we have a spiritual union and a corporal union, i. e., a union by charity and a union by conformity of nature. This two-fold union is symbolized in marriage : the union of mind between husband and wife represents the spiritual union of Christ with the Church, this which is effected through charity ; the corporal union represents equally that which is effected through conformity of nature ». L. IV, Dist. XXVI, F.

Hugh of St. Victor proposes another distinction : marriage consummated signifies the union of Christ with the Church, and marriage not consummated the union of charity between God and the faithful soul. Cf. FAHRNER, O. C., p. 133.

3. « Betrothment (*desponsatio*) sometimes takes place, in which the mutual promise of the man and woman concerns the contracting of marriage, but in which there is no consent *de praesenti*. There is also a *desponsatio* that has consent *de praesenti*, that is the conjugal compact, which alone constitutes marriage. In the former *desponsatio*, where the promise is to contract marriage, the parties are only betrothed, not married... but in the latter *desponsatio*, in which the consent is *de praesenti*, marriage is contracted, and from the first plighting of their

The teaching of Peter Lombard and the *School of Paris* was thus entirely opposed to that of Gratian and the *School of Bologna*. According to the *former*, marriage contracted by an *actual* contract was a perfect marriage, and, between Christians, a sacrament and a marriage absolutely indissoluble; while according to the Doctors of *Bologna*, it was only a half-marriage but begun, that had not yet reached the sacramental dignity, and liable to dissolution for a variety of reasons.

This celebrated doctrinal dispute finally gave rise to a *mixed theory*, that borrowed its elements from the two opposed parties. This mixed theory was sanctioned by the *Supreme Pontiffs*, and notably by Alexander III, who, as Magister Rolandus, had been an adherent of the School of Bologna. *On the one hand*, this theory admits the distinction between *sponsalia de presenti* and *sponsalia de futuro*, i. e., between the contract of betrothment properly so called, and the actual contract of marriage, and it recognises in marriage not consummated the quality of a perfect marriage and of a true sacrament; *on the other hand*, it denies it the absolute indissolubility, which Peter Lombard attributed to it, and grants this only to marriage *ratum et consummatum*: the copula is not an *essential*, but merely an *integrant* element of marriage, from which marriage derives some accidental perfection and a stricter indissolubility. Hence was gradually evolved the discipline, at present in force, according to which marriage *ratum non consummatum* is dissolved by a solemn vow and by Papal dispensation ⁽¹⁾. Thus, the controversy was ended ⁽²⁾.

Note. WATKINS, O. C., p. 125-126, shows confusion of thought in the argument that he adduces in connexion with the *copulatheoria*, as if from the fact that impotence in the matter of the conjugal act renders the marriage essentially null, it followed that the conjugal act itself belongs to the essence of marriage. The fact really is, that for marriage there is required the transfer of the *right* over one another's bodies, and consequently the possibility of conjugal use, but not the exercise of the right. Cf. below, nos 89 and 277.

troth in such *desponsatio*, the parties are called true husband and wife ». L. IV, Dist. XXVII, I.

1. We shall explain this development of the law later, in no 187.

2. Even at the present day, and among Catholics, there have been those who have defended the *copulatheoria*, foremost among whom is FREISEN, a writer whom we have frequently quoted, and who is well known as the author of a remarkable work: *Geschichte des canonischen Eherechts*.

In the preface to the second edition of his work, in 1893, however, he *retracted* his theory, p. xxiii-xxxiv, not, he says, for historico-juridical reasons, for

SECOND PROPOSITION. *Consent must be proper and personal, internal and free, outwardly manifested, absolute, simultaneous and legitimate.*

these, as he shows p. xxviii-xxxiv, are in his favour ; but because he recognises that he cannot bring his thesis into accord with the teaching of the Church, and in particular with that of the Council of Trent, concerning the nature of marriage and its sacramental dignity. He therefore admits that consent constitutes marriage, but nevertheless adds that to marriage thus essentially constituted, there is added, in consequence of the conjugal act, a certain accidental or rather integral perfection : « sie (die copula) fügt der Ehe etwas Neues, wenn auch nicht Wesenliches, sondern integrierendes hinzu » : which may, indeed, be said, as appears from what has been said, and as will be clear from the doctrine we shall have to propound below, concerning the indissolubility of the marriage bond.

FREISEN is wrong, as we have seen, in defending the copulatheoria by appealing to the *Roman law*, as if in that the « deductio » and the copula constituted valid marriage. He is wrong also in invoking the *Jewish law*, p. 92 ss., to the effect that marriage, according to the *Schidduchin* and *Kidduchin*, was perfected only by the « deductio » into the nuptial chamber.

WATKINS, O. C., p. 112-135, also vindicates the copulatheoria, and he is supported by others who are indicated by SÄGMÜLLER, O. C., 4^a P., p. 529 ss. See also LOTHÉ, O. C., p. 26 and 67, who gives several provisions of the ancient customary law of Flanders in which vestiges of the copulatheoria occur. Thus, in the country of Courtrai, the wife was not subject to the authority of her husband until after the first night of the marriage, i. e., until after the consummation of the marriage.

There are other customs in which the same idea appears : such as the ceremony called *Beilager*, which was long in use at the marriages of princes. It consisted in this : the newly married pair lay down fully dressed, in the presence of witnesses, on the nuptial bed, and a covering was extended over them. An analogous ceremony took place at marriages *by proxy* : not only did the proxy give the matrimonial consent in the name of his principal, but he also installed himself in the marriage bed with the bride, to symbolize thus the consummation of the marriage on behalf of, and in the place of the real husband. He lay down fully dressed, and in armour, but with the right foot and right arm uncovered ; between him and the bride was placed a sword. Cf. HANAUER, O. C., p. 253-265, and compare with what we have said above in the note to n° 50.

The ceremony of which we shall speak below in n° 122, 9°, is again, it appears, a vestige of the copulatheoria : the newly married, in certain places, receive the blessing of the priest as they are lying on the marriage bed.

For the connection of this theory with the *marriage law of Protestants*, consult SOHM, *Das Recht*, p. 208 s., 240 s. This author, in agreement with ROEDENBECK, O. C., is of opinion that the Protestant ecclesiastical law regards the

Explanation.

1. *Proper and personal*, so that if it be wanting, it cannot be supplied by paternal authority, or by the supreme authority of the Church or of the State : for it belongs exclusively to the bridegroom and the bride to transfer to one another the ownership of their bodies, and to take upon themselves the bond of marriage (¹).

61.
Matrimonial
consent must
be proper and
personal,

2. *Internal*, that is to say, emanating from the will. Hence one who gives a fictitious external consent contracts an invalid marriage, even under the discipline introduced by the Council of Trent and by Pius X. Nevertheless, in the *forum externum* credence is not readily given to one who says that he gave a fictitious consent (²) ; and even if it is certain that his consent was feigned, he may be compelled to give a valid consent, since that is often the only way of repairing the wrong done to the other party.

internal,

3. *Free* : this freedom supposes deliberation and a judgment sufficiently ripe, together with at least a vague idea as to the object of the consent. Substantial error and absence of deliberation destroy the validity of the contract ; but not, more probably, if we regard only the natural law (³), the fear, even though grave,

free,

mutual consent of the parties as only the initial element of marriage, insufficient by itself, and requiring to be completed by a real and effective taking possession : this is done by the interposition of the officiating clergyman, who, in the course of the religious ceremony, gives the bride and the bridegroom to one another ; but also, exceptionally, by the conjugal act itself.

1. We must be careful not to fall into the error of exaggerating this personal consent, as THANER does (o. c., p. 36 ss.). This author is not content with a legal consent analogous to that required in the case of other contracts, but requires a consent accompanied by personal knowledge and mutual love ; so that, on the one hand, he refuses to admit as valid a marriage by proxy between parties previously unacquainted with one another ; and, on the other hand, declares that it is opposed to the nature of marriage to break a contract that has been made between two persons, who seeing one another, love one another, and bind themselves to one another, notwithstanding that there is a question of error, and of error affecting the identity of the person.

2. Nullity of marriage owing to feigned consent was declared in the *Causa Parisien.*, 7 March. 1885 (A. S. S., XXIII, p. 14 ss.), and also in the *Causa Masilien.*, 1 June 1911 (A. A. S., III, p. 525 ss.). In both cases it appeared that the man went through the form of marriage without any matrimonial intent, but solely for the purpose of obtaining possession of the bride's dowry.

3. We shall state later, under n° 266, how far consent extorted by fear is valid in positive law.

that determined the consent : moreover, even if this fear was inspired for the express purpose of extorting consent, it seems that the freedom of consent was sufficiently safeguarded.

external, 4. *Outwardly manifested*, since the consent must be reciprocal, and accordingly known to both parties (¹).

absolute, 5. *Absolute or equivalently so*, that is to say, given without a suspensive condition, or after its fulfilment where such a condition has been added. We shall speak more at length of conditional consent in article 3.

simultaneous, 6. *Simultaneous*, seeing that marriage has for its constituent element mutual consent. Nevertheless, considering the nature of the marriage contract, physical simultaneity is not required, and *moral simultaneity*, such as exists when one of the parties gives consent during the virtual continuance of the consent given by the other party, is sufficient. If one of the parties retracts before the other party consents, there is no marriage ; and this retraction is presumed in the *forum externum* as often as the consent of the other party is unduly delayed.

and legitimate. 7. *Legitimate*. Consent, to be valid and capable of producing marriage, must be given by persons *capable of contracting, and under the conditions and with the formalities prescribed for its validity*. As we shall see further on, when speaking of impediments, people may be incapacitated not only by the *natural law*, but also by the *positive law*, through the act of the authority that regulates marriage ; this authority has also the right to lay down the conditions required for the validity of the contract, and the formalities to be observed in giving consent. We shall speak of these different formalities in article 2.

ARTICLE 2. Formalities of matrimonial consent.

Preliminary observations.

62.
*In the natural
law no special
formality is
required.*

1. In the natural law, mutual consent reciprocally manifested by words, or signs, or in any other way whatsoever, is sufficient ; and the presence of a third party is by no means necessary. It

1. The sacramental quality, which, as we shall see further on, is inherent in the marriage contract between Christians, requires the same condition, since consent constitutes the outward sign of the sacrament of matrimony.

would accordingly be sufficient if the bride signified her acquiescence by a simple inclination of the head, or if she of her own free will gave her hand to the man for him to place the wedding ring upon her finger, or, again, if she pressed the hand of the bridegroom while he expressed his consent (¹). In like manner sexual intercourse, with conjugal intent, would also suffice (²).

It is certain also that marriage *by proxy* is valid in the natural law, provided the proxy has received a special commission, and the principal has not retracted his consent before the marriage takes place. In like manner, marriage *by letter* is valid, though there may be a doubt as to the precise moment at which the contract comes into force (³).

2. In the positive law, in the marriages of baptized, the formalities prescribed by the Church must be observed; and in the marriages of unbaptized, those required by the State (⁴). The provisions of the *civil law* are given at the end of this article. As regards the provisions of the *canon law* :

63.
Formalities
required by
the canon
law :

Formerly, *before the Council of Trent*, no special formality was prescribed for the validity of marriage, but it was nevertheless forbidden, under pain of grievous sin, to marry clandestinely, i. e., without the presence of kinsmen, or of a notary, or of a priest (⁵). The Council of Trent., Sess. XXIV, ch. 1, *De Ref. Matrimonii*, introduced the *diriment impediment of clandestinity*, incapacitating such as should contract marriage « otherwise

*before the
Council of
Trent ;*

*after the
Council of
Trent ;*

1. It may be asked if the *silence* of a son in the presence of his parents, who make the contract for him, sufficiently manifests his consent; and it is debated, if the presumption that Boniface VIII, cap. unic., in VI^o, IV, 2, draws from this silence in favour of betrothment, is applicable to marriage. In the face of this controversy, one cannot make use of the affirmative opinion, except in cases where it is clearly shown that silence did include the required consent. Cf. GASPARRI, o. c., n^o 831; WERNZ, o. c., IV, n^o 46.

2. Thus in former times the conjugal act, following on betrothment, carried with it a conclusive presumption (*juris et de jure*) of matrimonial consent. See above, n^o 14.

3. Cf. GASPARRI, o. c., n^o 832, and nos 773 and 775. See below, n^o 70.

4. See below, n^o 224.

5. Cf. c. 1-5, C. XXX, qu. 5; c. 3, X, IV, 3; Benedict XIV, *De Syn. dioc.*, l. VIII, ch. XIII, nos 3 ss.; Council of Trent, Sess. XXIV, ch. 1, *De Ref. Matr.*; the *Votum Defensoris matrimonii ad Decretum Ne Temere*, in the *Acta S. Sedis*, 1907, p. 542 s.; cf. also SCHULTE, o. c., p. 36-45.

than in the presence of the parish priest (¹), or of a priest approved by him or by the Ordinary, and of two or three witnesses ». Many countries, however, were exempt from the application of this decree (²).

since the
decree
Ne Temere.

Quite recently, the celebrated decree *Ne Temere* (³), of which we have spoken above, and which came into force from Easter Sunday (19 April) of the year 1908 (⁴), inaugurated a new discipline, which *from that date takes the place of the former discipline* (⁵). This new discipline modifies not only the formalities required for consent, but also the very economy of the Tridentine decree ; for while this latter took effect through the impediment of clandestinity *by incapacitating the contracting parties* (⁶), the impediment under the present discipline directly affects the *form of the contract*. For this reason we prefer to speak of it here rather than under the head of impediments.

In a first section we shall describe the formalities required in order that marriage may be both lawful and valid (⁷) ; in a second section we shall show what marriages fall under the new law.

1. Whatever may have been the intention of the Tridentine Fathers, it is certain that the chapter *Tametsi* has always been understood in this sense, that for the validity of marriage, the presence, not of any parish priest whatever, nor of the parish priest of the place where the marriage took place, but of the *particular* parish priest of the contracting parties, to the exclusion of any other, was necessary. Cf. the *Votum* Consultoris ad decretum *Ne Temere*, in the *Acta S. Sedis*, 1907, p. 574 s. ; the *Votum* Defensoris matrimonii, *ibid.*, p. 545, and p. 554 ss.

2. Concerning the fortunes of the chapter *Tametsi* at the Council of Trent, cf. ESMEIN, o. c., II, p. 155-208.

3. The decree *Ne Temere* was, indeed, issued by the S. C. C., but it is rather a Pontifical decree than a decree of the S. Congregation, as it was approved by the Pope *in specifica forma*. See the Author's *Commentarius in Decretum*, p. 9. The text of the decree is given at the end of this treatise ; the previous *Acta* may be seen in the *Acta S. S.*, t. XL, p. 591 ss. ; the principal commentaries appear in the index.

4. An exception was made in favour of the Chinese empire, for which a proration was granted till Easter 1909 (11 Apr.) by letters of the S. C. de P. F., dated 29 Feb. 1908.

5. The new law has *no retrospective effect*, and consequently all marriages anterior to Easter 1908, are subject to the Tridentine decrees.

6. Cf. ESMEIN, o. c., I, p. 78 ss. See also below, where we speak of the power of setting up impediments.

7. We are here abstracting from the *sacramental ceremonies*, of which we shall speak later.

PARAGRAPH I. FORMALITIES TO BE OBSERVED.

FIRST POINT. FORMALITIES REQUIRED FOR VALIDITY.

I. General rule.

PROPOSITION. *Marriage, in order to be valid, must be celebrated before two witnesses, and either before the parish priest or the Ordinary of the place where it takes place, or before a priest delegated by one or the other. The parish priest, or the Ordinary, or the delegate, being invited and requested, and not constrained by violence or grave fear, must ask and receive the consent of the contracting parties.*

64.
Formalities
required for
validity :

Explanation.

A. The assistance of the parish priest or of the Ordinary.

1. By *Ordinary* and *parish priest* must be understood those who are specified in the decree of the C. S. O. of 20 Febr. 1888 ⁽¹⁾, and in chapter II of the decree *Ne Temere*. Under the appellation of *Ordinary* come Bishops, Administrators or Vicars Apostolic, Prelates or Prefects having jurisdiction together with a separate territory, their Officials or Vicars General for spiritual affairs, and, *Sede vacante*, the Vicar Capitular or legitimate administrator.

As a general
rule, the
presence is
required

Under the name of *parish priest* are here included ⁽²⁾ « not only he who is lawfully at the head of a parish canonically erected (and consequently the parish priest properly so called, even if he is only a « succursalist », as well as the officiating priest (*deservitor*) or administrator of a vacant parish), but also, in those parts in which parishes have not been canonically erected, the priest who has duly received the care of souls in a definite district, and who is equivalent to a parish priest ; and also, in missions where the districts have not as yet been perfectly divided, every priest who has been generally deputed by the Superior of the mission for the care of souls in any station » ⁽³⁾.

of the Or-
dinary, or of
the parish
priest

1. *Collectanea*, n. 1471 ; see below, n° 352.

2. This cannot be indiscriminately applied where the matter is different.

3. With regard to these last, Besson, *N. R. Th.*, 1907, p. 616 s., makes the following observations : a/ « Dans une mission où plusieurs prêtres auraient reçu chacun cette délégation universelle pour toute la mission, chacun serait ainsi curé au sens du décret dans toute l'étendue de la mission ; si, au contraire, la mission a

A priest who has the universal and full charge of a parish, the parish priest of which is insane or obviously incapable of discharging his duties for a long time to come, may also be regarded as equivalent to a parish priest. But the coadjutor of a parish priest who administers his own parish, a vice-pastor, or assistant, as he is called in North America, is not considered as such. We are also of opinion that the Bishop has no power to make them quasi-parish priests for the purpose of assisting at marriages, unless he grants them the care of souls, full and independent of the parish priest (for this would be to change the vicarious office and appoint two parish priests); they can only be delegated by the Bishop or by the parish priest (though certainly to the universality of cases), and so cannot subdelegate, except for a particular case. For this, see below, n° 65 *ad finem* (¹).

of the place
where the
marriage is
celebrated ;

2. The Ordinary and the parish priest *of the place* (diocese or parish respectively), within the limits of which the marriage takes place, are the only ones competent to assist at the marriage.

The parish priest or Ordinary, whose presence is required for the validity of the marriage, is not now, as heretofore (²), the parish priest or Ordinary, in whose parish or diocese (³) one or

été partagée en divers districts ou stations plus ou moins étendus, et des prêtres placés respectivement à la tête de chaque district ou de chaque station, chacun de ces prêtres sera curé dans le district ou la station dans lesquels il a charge d'âmes.

b/ il faut toutefois se garder de confondre la charge d'âmes, qui donne qualité pour signer aux fiançailles et assister au mariage, avec tout autre mandat ecclésiastique ou religieux. Il arrive souvent, dans les missions, que plusieurs postes, ayant chacun un missionnaire à sa tête, sont réunis en district sous l'autorité d'un supérieur. Il ne s'ensuit pas que ce supérieur puisse être témoin qualifié des fiançailles et du mariage dans tout le territoire du district. Parfois en effet il n'aura pas reçu la charge spirituelle immédiate des fidèles, mais sa congrégation lui aura seulement donné autorité pour diriger la vie religieuse de ses confrères».

1. Cf. in this sense *Archiv. f. k. Kirchenr.*, 1910, p. 593; CREAGH, o. c., p. 53 ss.; DE BECKER, *Ne temere*, p. 13 and 31. Of a different opinion is McNICHOLAS, in the *Eccles. Review*, t. XXXVIII, p. 145 s., and t. XXXIX, p. 36 s., cf. p. 438, where he says that some Bishops have in the above mentioned manner appointed assistant priests as quasi-parish priests with a view to the validity of marriage; likewise WOUTERS, o. c., p. 34.

2. See what has been said above on the interpretation of the chapter *Tametsi*.

3. According to the decree of the C. S. O., 9 Nov. 1898, in order that the Ordinary might be the proper Ordinary with regard to a marriage, it was necessary

other of the contracting parties has a domicile or quasi-domicile, but the parish priest or Ordinary of *the place within the limits of which the marriage takes place*; so that it is before him alone (or before the priest delegated by him, as we shall say later) that the marriage can be validly celebrated, whether the contracting parties are his subjects or not. This is *the principal change made in the law of clandestinity*; and this modification has been introduced with the object of avoiding the complications and difficulties that were frequently experienced in connection with the decree *Tametsi* ⁽¹⁾.

Observe that it follows from this, that, contrary to what obtained under the Tridentine discipline, a parish priest or Ordinary *cannot* henceforth, without delegation, assist at the marriage of his own subjects, *outside of the limits of his own parish or diocese*; while he can, on the other hand, in opposition to the former law, validly assist at the marriage of those who are not his subjects, provided it is celebrated *within the limits of his territory* ⁽²⁾, that is to say, provided he be the parish priest or the Ordinary of the place where the marriage takes place ⁽³⁾.

to consider the fact of domicile not in the diocese in general, but in a determinate parish of the diocese. Cf. below, n° 73.

1. «Sæpe namque », as the introduction to the *Ne Temere* observes, «gravis extitit dubitatio in decernenda persona parochi, quo præsentè matrimonium sit contrahendum. Statuit quidem canonica disciplina proprium parochum cum intelligi debere, cujus in paroecia domicilium sit aut quasi-domicilium alterutrius contrahentis. Verum quia nonnunquam difficile est judicare certo ne constet de quasi-domicilio, haud pauca matrimonia fuerunt objecta periculo ne nulla essent; multa quoque sive incitia hominum sive fraude, illegitima prorsus atque irrita deprehensa sunt. Haec dudum deplorata, eo crebrius accidere nostra ætate videmus, quo facilius ac celerius commeatus cum gentibus etiam disjunctissimis perficiuntur ».

2. *The churches of regulars, even those exempted*, are no exception: they may and ought to be considered « as the territory of the parish priest or Ordinary of the district in which they are situated for all that concerns assistance at marriage ». S. C. de Sacr. 13 March 1910, c. 8.

3. Many doubts were proposed to the C. S. O. and solved 1 Feb. 1908, with regard to certain special classes of parish priests. These doubts concern the competence of the parish priest of the place where the marriage is celebrated, but they are hardly applicable to our country. They are the following :

a) As concerns strictly *personal* parish priests, who, like military chaplains, have no territory, not even in conjunction with another parish priest, but exer-

he must have
taken possession of his
benefice, and
not be under
any public
censure ;

3. In order that his assistance may be *valid*, it is necessary a/ that he should have taken possession of his benefice, or have begun to exercise his office, and b/ that he should have incurred no suspension (*ab officio*), and no excommunication by name in virtue of a public decree.

It is not sufficient, then, that the Bishop should have been elected, or that the parish priest should have been nominated by the Bishop ; it is necessary that the former should have taken possession of his see, and that the latter should have already assumed the administration of his parish or quasi-parish and the charge of his office. In the diocese of Bruges, this ordinarily takes place when

cise jurisdiction directly on persons and families, and follow them in their changes of residence, nothing has been changed (ad 7^m), and consequently they can validly assist *anywhere* at the marriage of their subjects. Cf. *Coll. Brug.*, t. XIII, p. 302 s. ; *Archiv. f. k. Kirchenr.*, 1908, p. 730 ss. and 1910, p. 141 ss. ; KNECHT, o. c., p. 67 ss. ; DI PAULI, o. c., p. 85 ss. But such chaplains can no longer assist at the marriage of *other* persons in *their church or military chapel*, as they could before the decree of Pius X ; they would now require to be delegated by the parish priest of the parish in the territory of which the church in question stands. Cf. *Theologische Revue*, 1910, p. 221.

b) Parish priests who have no territory exclusively their own, but have one in common with one or more other parish priests (as is the case, e. g., where two parish priests have charge of souls in the same parish, but, for inhabitants of two different nationalities respectively), validly assist at all marriages within the limits of the territory that they hold collectively (ad 8^m). *Coll. Brug.*, t. XIII, p. 302 s. ; SCHULZE, *Kirchl.-Kath. Eherecht*, l. c., p. 814 s.

c) Parish priests who, in addition to their own territory, have also in other parishes certain persons or families who belong to their flock, can validly assist there at the marriage of their subjects. This is the reply given ad 9^m, after consultation with His Holiness, *Collat. Brug.*, t. XIII, p. 303 s. The question whether the parishioners of these personal parish priests could also be validly and lawfully married before the parish priest of the place where they reside, was left undecided by the C. S. O. in its reply of 27 July 1908, ad 8^m. Cf. *Coll. Brug.*, l. c., p. 597 and 645 ; *N. R. Th.*, 1908, p. 729 ss. But two years later, 2 June 1910, in a particular case in which these special circumstances arose, the S. C. de Sac., after consultation with the Holy Father, gave a negative reply, which may be found in the *Acta Ap. Sedis*, 1910, p. 447 s. ; and in the *Coll. Brug.*, t. XV, p. 432 ss.

d) Rectors of pious establishments, e. g., hospitals, exempt from parochial jurisdiction, can, provided they have received the full powers of a parish priest, assist at the marriage of persons under their charge, in the place in which they exercise their jurisdiction (ad 10^m). Cf. *Coll. Brug.*, t. XIII, p. 304, and also *Rev. eccl. de Metz*, 1908, p. 297 s.

the parish priest visits his new parish for the first time (¹).

From the day of taking possession, the Ordinary or the parish priest is capable of assisting validly at marriages, and he remains so, provided he be not excommunicated publicly and by name (that is to say, by name and christian name (²), or at least in such terms as designate him quite evidently), or suspended from his office (³) publicly and by name, whereby he would be prohibited from all exercise of jurisdiction and of orders (⁴).

As formerly, so at the present time, it is not necessary that the *parochus* should be a *priest*, since the decree does not explicitly require it, and the nature of the office to be discharged does not demand it, seeing that assistance at marriage involves the exercise neither of orders nor of jurisdiction (⁵). Moreover, there seems to

1. «Nomine possessionis hic intelligi illum actum, qui, sive institutio corporalis, sive inthronizatio, sive installatio, sive aliter nuncupetur, tamen semper id efficit ut institutus in beneficium exinde adipiscatur liberum exercitium potestatis, suo officio adnexae ». Thus the C. S. O., 2 March 1908. See *Coll. Brug.*, t. XIV, p. 362 s.; *Coll. Namurc.*, t. IX, p. 73, where we find that parish priests take possession of their benefices in the diocese of Namur otherwise than in the diocese of Bruges. Cf. also *N. R. Th.*, 1909, p. 488 ss.

2. An excommunication of this kind was pronounced against Loisy by the C. S. O., 7 March 1908.

3. We say : *suspended from his office* : the disqualification of a parish priest, therefore, does not require that he should first be *suspended from his benefice*, and deprived of the right of receiving the emoluments of his office ; moreover, the suspension from his benefice alone would not suffice.

4. Under the Tridentine discipline it was generally admitted that a parish priest excommunicated, even by the greater excommunication, and suspended, validly assisted at a marriage ; but not one guilty of public heresy, even, according to most authorities, before the declaratory sentence. On this subject see WERNZ, o. c., IV, n° 617, note 184 ; ROSSET, o. c., n° 2208. The new discipline is in part more severe, since it does not admit the parish priest who is notoriously suspended, and who is excommunicated by name and publicly ; in part also it is less severe, since it seems to admit parish priests who are guilty of heresy, unless, on this head, they have been notoriously and by name excommunicated, or publicly suspended by a judicial sentence. See in the *N. R. Th.*, 1910, p. 465, the case of a parish priest in France, who was at the head of one of the *associations cultuelles* condemned by the Holy See.

5. See below, n° 110 ; HARING, *Ne Temere*, p. 13, compare with WERNZ, o. c., IV, n° 176, and FEYER, *De Imped.* ; this last answers the difficulty presented by the text of the Council of Trent, which says « praesente parochus, vel alio sacerdote », a form repeated in the recent Decree.

be nothing requiring modification in the common opinion, that a putative parish priest assists validly at marriages, and that the Church supplies what is wanting, provided there be the *titulus coloratus* and the *error communis* (1).

4. As regards the *manner of assisting* : The parish priest and the Ordinary assist validly only « *when, being invited and asked, and constrained neither by force nor by grave fear, they ask and receive the consent of the contracting parties* ».

he must be
invited to
assist at the
marriage and
ask the con-
sent ;

a/ *Heretofore*, under the Tridentine discipline, according to the general teaching, the purely *passive* assistance of the parish priest as qualified witness, in such manner as to understand the consent given in his presence, and to be able to testify to it in case of need, was sufficient. It was even held that the marriage was valid when the parish priest had understood nothing, but had intentionally kept himself from doing so.

Henceforth, a *positive act* is required on the part of the parish priest ; he must ask and receive the consent in due form (2).

b/ *Heretofore*, the parish priest had to fulfil his office of witness, of authorized and qualified witness (3), but the contracting parties were under no obligation to ask him to be present for this purpose ; it was sufficient for them to show, even implicitly, by their manner of acting, that they wished to contract marriage, and that they took him as witness, even if he happened to be there by chance, or had been sent for, under some other pretext.

Henceforth, the parish priest must be *asked and invited* to assist at

1. There is a *titulus coloratus*, when the parish priest has been appointed by a competent authority, but invalidly, owing to some hidden defect ; there is an *error communis*, when the parish priest is recognised as such by his flock, but is not really such on account of some hidden defect. There is said to be a *probable* error when the defect is not easily discovered. The Author has treated this subject at length in the *Coll. Brug.*, t. IV, p. 642 ss., and there gives the legal texts on which he relies.

2. The parish priest will have to take into account this innovation when assisting at *mixed* marriages, of which we shall speak under n° 257. For marriages by letter, see below, n° 70.

3. It was necessary then, and is still necessary, that the parish priest should be present as the *qualified witness* ; hence the invalidity of marriages contracted before a civil officer and two witnesses, of whom the parish priest is one, but only as an ordinary witness, Cf. *Rev. du clergé fr.*, t. XIV, p. 209 s.

the marriage ⁽¹⁾; and thereby marriages, known as « *par surprise, ou à la Gaulmine* », are rendered impossible; thus an end is put to the doubts ⁽²⁾, and other inconveniences ⁽³⁾, that manœuvres of this kind occasionally gave rise to in the past. It is sufficient, however, that there should be an *implicit* invitation; there is no necessity for it to be explicit and formal ⁽⁴⁾, and it is enough that it should emanate from one of the parties.

c/ *Heretofore*, the validity of the marriage was not endangered by the fact that the parish priest had been constrained *by fear or violence* to assist at it. *Henceforth*, the hypothesis of assistance extorted by fear, we are speaking, of course, of grave fear, falls to the ground ⁽⁵⁾.

he must do so
unconstrained
by fear.

B. The assistance of the delegated priest.

The Ordinary or the parish priest, who is competent to assist

65.
The priest
competent to
assist can
delegate an-
other in his
place;

1. *Coll. Brug.*, t. XII, p. 470. This follows from the condition indicated under letter a/. We must, however, make an exception for the extraordinary case in which, as we shall see later, a marriage, celebrated before two witnesses only, would be valid; the assistance of these witnesses is not affected by the modification of the former law.

The change made in the assistance of parish priests has been introduced « out of respect for them and for the dignity of the sacrament; for parish priests were not sufficiently protected, under the former law, against trickery and violence, and could be forced to give their assistance, even in self-defence ». Consultor of the S. C. C. in the *Acta S. Sedis*, t. 41, p. 278. Cf. BÖCKENHOFF, *Ne temere*, l. c., p. 559.

2. See the decision of the tribunal of the *Rota*, 28 May 1909 (in the *Canon. cont.*, 1909, p. 587 ss.), concerning a marriage contracted in 1897.

3. It is thus that certain betrothed acted, when they desired to contract a mixed marriage, in view of which they had been unable to obtain dispensation.

4. Decree of the S. C. C. of 28 March 1908, ad 4^m. Many writers justly remark that the invitation is sufficient, if the parish priest himself approaches the engaged parties, and they consent to be married before him. See GENNARI, o. c., p. 26; VERMEERSCH, o. c., p. 45; VAN DEN ACKER, o. c., p. 33; WOUTERS, o. c., p. 43.

5. WOUTERS, o. c., p. 44, and BESSON, *N. R. th.*, XL, p. 34, declare, in opposition to DE BECKER, *Legislatio nova*, p. 26 s., that the case of grave fear, even when merited in the main, and justifiable in form, is an impediment to the validity of the assistance of the parish priest. See also VAN DEN ACKER, o. c., p. 34, who observes that *fraud* alone, without violence or threats, does not affect the validity; such would be, e. g., the case of a parish priest who, being deceived by the engaged parties as to their domicile or place of residence, assisted at their marriage.

at the marriage (¹), is empowered *to delegate* another priest in his place. In order that the assistance of this delegate may be valid, it is necessary to observe the conditions prescribed for the validity of the *delegation* and of the *assistance*.

this delegation

1. The conditions required for the **validity of the delegation**, regard being had to the provisions of the former and of the new legislation (²), are the following :

a) must be confined to the territory of the principal,

a/ The delegation must not go beyond the limits of the competence of the principal himself ; consequently he cannot delegate anyone to act for him in this matter beyond the *limits of his own territory*.

b/ It must be made to a *determinate priest*.

b) made to a determinate priest,

It would be invalid if it were given in an indeterminate manner, by designating, for example, in general and indefinitely one of the curates of a parish, or any priest whom the engaged parties might choose (³). It is necessary that the delegate should be specified by name, or by his office, or in some other way. It is permissible, however, to give the delegation either directly to the priest himself, or through the agency of the engaged parties, by permitting them to be married before some definitely designated priest. There is no reason, moreover, why a parish priest should not delegate several priests at the same time, for instance, all his curates, so that any one of them might validly assist at marriages during his absence.

Observe also that the contracting parties need not be determined in the delegation, and that consequently the delegation is valid if given for contingent marriages that may take place on such a day or in such a week.

1. Thus the parish priest cannot *delegate* another priest in his place before taking possession of his benefice ; nor can he do so, in all probability, so long as he remains publicly and by name excommunicated or suspended : some, however, deny this second point. Cf. VAN DEN ACKER, o. c., p. 58 s. ; WOUTERS, o. c., p. 58 ; OJETTI, *Fus Pianum*, n. 103.

2. The change made here by Pius X is in the two following points : only a *determinate* priest can be delegated, and the delegation *is restricted to the territory of the principal*. The S. C. C., 27 July 1908, ad 4^m, declared that apart from this, no change had been made in the matter of delegation.

3. This kind of delegation was valid under the former discipline, at least when the parties to be married were quite determinate. See the Author's *Commentarius*, p. 24.

c/ The delegation must be *really given*, for a simply presumed or interpretative delegation will not suffice ⁽¹⁾; moreover, it must have been expressly or tacitly *accepted*, at least when the delegation is given to a priest who is not subject to the authority of him who gives it ⁽²⁾; note also that the delegation does not hold good in the case of error affecting the person of the delegate, or that of the contracting parties ⁽³⁾.

c) positively
given and
accepted,

1. *Tacit* delegation is considered to be sufficient, that is to say, such as can be deduced from antecedent and really conclusive facts; for tacit delegation can sufficiently express the positive will of the principal. Cf. the *Causa Mediolanen.*, 15 Feb. 1910, in the *Acta Ap. Sedis.*, II, p. 206 ss. But whether there is tacit delegation where a parish priest, for instance, sees another priest officiating at a marriage in his place, and allows him to proceed without protest, must depend upon the particular circumstances of the case. This at least is certain, that the silence of the parish priest does not suffice, where he is under an erroneous impression that the priest in question needs no delegation. Cf. *Coll. Brug.*, t. X, p. 609 s. See also the decree of the S. C. de Sacr., 12 March 1910, ad 6^m, and compare with *Coll. Brug.*, t. XV, p. 316 s. In the last named, following the decree quoted, we have laid it down as a practical rule, that one should abstain from assisting at a marriage without having obtained beforehand an *express* delegation, excluding all possible doubt. It is better still to obtain a delegation *in writing*, if one happens to be a stranger in the parish. Cf. *Coll. Gand.*, t. II, p. 193; *Instructions du Vicariat de Rome*, l. c., p. 614.

2. Cf. *Th. Pr. Quartalschr.*, 1911, p. 127; WERNZ, o. c., n. 180, note 218. There is not much occasion to trouble oneself about the *acceptance*, less, indeed, now than formerly, as there must be a positive act on the part of the delegate in assisting at the marriage; and it is almost impossible that this act should not include his tacit acceptance of the delegation. Still such grotesque cases may occasionally arise. Thus the *Th. Pr. Quartalschr.*, 1911, p. 125 s., gives the case of a parish priest who was provided with the required delegation, but, not caring for it, and wrongly persuading himself of its inutility, officiated at the marriage on his own account. See also the *Causa Divionen.*, decided by the S. Rota, 20 Jan. 1911 (A. A. S., III, p. 284 ss.), where the question of acceptance is clearly stated, and the following conclusion is arrived at: the affirmative opinion is the more probable, but it is not certain, and therefore, if a marriage had been contracted before a priest who was ignorant of the fact of delegation, it could not be pronounced null and dissolved on these grounds; it would be necessary to have recourse to Rome and to lay the case before the Holy See. Cf. *N. R. th.*, 1911, p. 664 ss.

3. For instance, in the case in which a parish priest, refusing to assist at the marriage of a certain person and to delegate another priest in his place, should be deceived by the employment of a false name, and so give his permission. Cf. DE BECKER, *De Matr.*, p. 106.

d) and not
revoked.

d/ Finally, the delegation must not have been duly *revoked*, nor have lapsed spontaneously. The delegation does not lapse *by the death of the principal*, or by his resignation or removal, in relation to a matter already begun, that is to say, when the first step has been taken with reference to the cause for which the delegation was given ; moreover, it does not lapse in relation to other matters, provided it was given for all causes, or even for a particular cause with directions to carry it out ⁽¹⁾.

In addition to this, the *general principles* concerning delegation ought to be applied here.

The Church
sometimes
supplies.

Thus *the Church* sometimes *supplies* what is wanting in the delegation and renders the assistance of the delegate valid, notably in the case in which he has received his delegation from a competent authority, though it is invalid owing to some hidden defect ⁽²⁾. Such would be the case of a delegate who, apart from the hypothesis given above, assisted at a marriage in ignorance of the fact that his principal was dead at the time. Cf. *Collat. Brug.*, t. VII, p. 267 s.

Delegation
for the uni-
versality of
causes and for
a particular
cause.

The delegation may be given for the *universality of causes*, or it may be *special* and concern only a *particular cause*.

The *first* hypothesis is verified, when « a delegate is charged with all causes in general, or at least with a certain class of causes, as, for example, with matrimonial causes entrusted to him collectively, though this delegation be restricted either as to time... or as to place » ⁽³⁾. The *second* hypothesis is that of a delegation re-

1. See on this subject what we have written at considerable length in the *Coll. Brug.*, t. VII, p. 264 ss. In the diocese of Bruges, special provision is made for cases of resignation or of translation : « Parochus ad alium locum nominatus vel officio renuntians, ex delegatione nostra jurisdictionem pastorem in parochia unde transfertur conservabit, donec a successore fuerit monitus quod hic administrationem parochiae in se suscipit ». *Liber manualis*, p. 163.

2. This would be the case of a *titulus coloratus* together with an *error communis*, and it would be necessary to apply to the delegate the principle invoked in the case of the parish priest himself, viz., that the Church supplies what is wanting in his qualification.

3. REIFFENSTUEL, o. c., l. I, tit. 29, n° 31. In order that one may be delegated for the universality of matrimonial causes, it is not sufficient that he should be delegated to *assist* at all marriages, but it must be a delegation that enables him to deal with *all matrimonial causes*, i. e., to examine the engaged parties, to publish the banns and to fulfil all the duties of a parish priest with relation to marriages. Cf. GASPARRI, o. c., n° 945 ; *Rev. eccl. de Metz*, 1910, p. 140 ss.

stricted to a single cause, or to a number of clearly specified causes.

As regards *the faculty of subdelegating* : the rule is that the delegate possesses it in the first hypothesis, but not in the second, unless he has been delegated by the supreme or Papal authority, for some other reason than in consideration of his personal merits, or has received expressly the faculty of subdelegating. A delegate cannot subdelegate for the universality of causes ⁽¹⁾, neither can he subdelegate anyone with power for him to subdelegate in his turn ⁽²⁾.

Note. a) The faculty of administering the sacraments, given by the Bishop to the curates of a parish, does not carry with it, as a general rule, and especially in Belgium, the delegation required for assisting at marriages. It would sometimes be a convenience, as we have just said, if parish priests granted this to their curates, restricting it to occasions when the parish priest is absent, and granted it for the universality of matrimonial causes, or with power to subdelegate. This is the advice given by the Bishop of Metz, in the *Rev. eccl. de Metz*, 1908, p. 302 ; see also LEITNER, *Ne temere*, p. 47, where he quotes the same disposition for the diocese of Passau and that of Limburg ; cf. *Coll. Brug.*, t. V, p. 310 and t. IV, p. 116 s. ⁽³⁾.

b/ Formerly, under the *Tridentine discipline*, certain marriages, especially in the larger towns, were exposed to the danger of nullity owing to frequent changes of domicile or of quasi-domicile. Many engaged parties, having recently removed from one parish to another, went to be married before a parish priest who had not the requisite powers. To obviate this

1. Cf. REIFFENSTUEL, l. c., n. 55 ss. ; GENNARI-BOUDINHON, o. c., 2a P., consult. 64, n° 5. There is no reason why the delegate should not subdelegate habitually.

2. See *Pastor Bonus*, 1907, p. 161.

3. The Holy See does not disapprove of the custom in force in certain places, in accordance with which the parish priest delegates in due form, but *once for all*, another priest to take his place in assisting at marriages. The S. C. de Sacr., 15 March 1910, ad 6^m, in reply to a question on this point, tacitly granted permission to maintain this custom, provided it was not contrary to local legislation. See above, under n° 64, where we observed that not a few, especially Bishops of North America, have delegated curates or assistants to be present at marriages in their respective parishes or in the whole diocese.

danger the parish priests or the Ordinaries sometimes had recourse to a general and mutual delegation between all the parish priests of the same town.

The S. C. C., having been consulted with regard to this arrangement, approved of it by a decree dated 9 Nov. 1898, subject to certain precautions, a list of which may be found in the *Coll. Brug.*, t. IV, p. 244 ss., together with the text of the decree of 1898; compare also t. V, p. 308, and t. XIII, p. 66 with the passages quoted (¹).

66.
Conditions of
assistance on
the part of
the delegate

2. Conditions for the **valid assistance** of the delegate: According to Article VI of the Decree, the delegate must observe « the limits of his mandate and the rules laid down... for the parish priest and the Ordinary of the place ». It is necessary, therefore, that he should not be, publicly and by name, excommunicated or suspended from his office. He must be invited and asked (²) to assist at the marriage, he must not be influenced to do so by violence or grave fear, and he must, as delegate, ask and receive the consent of the parties, keeping himself strictly within the limits of his mandate.

67.
There must
be two wit-
nesses,

C. The assistance of the witnesses.

It is necessary and sufficient that they should assist *as witnesses*.

For this purpose 1. it is *sufficient* that they should assist *passively*, without any act on their part being required.

who must be
morally
present,

2. It is *absolutely necessary*:

a/ that they should be present, not only physically, but also morally. It is not enough for the witness to be present in a merely material manner, e. g., fast asleep, or entirely taken up with other occupations, at the moment when the consent is given. He

1. In conformity with this decree, the Bishop of Bruges, in the Congr. Prosyn. of 1898 (*Coll. Brug.*, t. IV, p. 377), granted « to the parish priests of any place in the diocese, in which there are two or more parishes, the faculty (with power to subdelegate) to assist at the marriages of those whose banns they had published after previous inquiry, even if they had in the meantime left their parish, but not their diocese ».

These provisions are now obsolete; for, on the one hand, under the new discipline, *all* parish priests validly assist at *all* marriages within the limits of their own territory; and, on the other hand, the diocesan decree affected only the question of validity, as we have shown in the *Coll. Brug.*, t. V, p. 309.

2. It would certainly seem sufficient that the parish priest himself should have been invited and asked; through him his delegate is also considered to have been invited.

must (except in the case of affected ignorance) ⁽¹⁾ know that the marriage is being contracted in his presence, and must accordingly hear the words of the contracting parties, or perceive the signs which express their mutual consent. In a word, it is necessary and sufficient that the witnesses should be able to attest, from their own knowledge of the fact, that the marriage has duly taken place between the respective parties ⁽²⁾.

This is what is meant by moral presence. Such moral presence is quite consistent with the fact that the witness was present at the ceremony by chance, or as the result of *deceit or violence*. The exception made in the decree *Ne Temere* affects only the parish priest and the delegate.

b/ It is necessary that the witnesses should be made use of *as such*; in other words, as we have said in n° 64, the action of the engaged parties should be such as to imply and to make apparent, to some extent at least, their desire to contract marriage in the presence of these persons as witnesses. *and must be made use of as witnesses.*

There is, therefore, a twofold condition to be fulfilled: *the one* on the part of the witnesses, viz., their moral presence; and *the other* on the part of the engaged parties, viz., their intention to take them as witnesses. There is no need of an express invitation; it is sufficient to have the witnesses present as such, so that this second condition is practically included in the former. Thus, all that is requisite is that the attention of the bystanders should be called to what is going on, and that the contracting parties should then, in their presence, give their mutual consent, in such a manner that the witnesses may duly perceive that the marriage is taking place ⁽³⁾, without the formality of a previous invitation ⁽⁴⁾.

1. His assistance would then be valid, even if he had perceived nothing. *Coll. Brug.*, t. XII, p. 470.

2. It follows that the presence of the witnesses may be regarded as valid, even if they were not standing by the side of the contracting parties, as might happen through forgetfulness.

3. Thus, e. g., the sacristan, who assists the parish priest in the celebration of the marriage, is reckoned a competent witness, and, if he has really paid attention to the giving of the matrimonial consent, he is a valid witness, even though he has not been formally notified beforehand. It is the same with other persons present, at least if the bride and bridegroom are conscious of their presence.

Cf. *Coll. Brug.*, t. XII, p. 471 s.; BASSIBEY, *Clandestinité*, n° 152; DESHAYES, o. c., qu. 127 together with the documents given there *N. R. Th.*, XVII, p. 107 ss.

4. The invitation required by the new ecclesiastical law applies only to the case of the parish priest or his delegate.

Observe that under the discipline of Pius X, as under that of the Council of Trent, any person capable of the office may be *validly* employed as a witness, but that, nevertheless, it is *unlawful* for non-catholics to act as witnesses at a Catholic marriage ⁽¹⁾, and it is indecorous to employ women in that capacity ⁽²⁾.

68.
Exceptions :
to in danger
of death ;

II. Exceptions.

First case. « *When danger of death is imminent, and the parish priest or the Ordinary of the place, or a priest delegated by one or the other of them, cannot be had, in order to provide for the relief of conscience, and (if necessary) for the legitimization of offspring, marriage may be validly and lawfully contracted before any priest and two witnesses* ». Art. VII, Decree *Ne Temere*.

It is a question here of a valid (and at the same time lawful) marriage *before any priest whatever*, even before one who is suspended and excommunicated by name and deprived of all delegation ⁽³⁾, and two witnesses.

The validity (and lawfulness) of such a marriage is subject to *three conditions* :

1. It is necessary that one of the contracting parties at least should be in danger of death, no matter from what cause.

2. It is necessary that it should be impossible either to send for the competent priest, i.e., the parish priest or the Ordinary or the priest delegated by them, or to obtain the requisite delegation ⁽⁴⁾

1. *Instr. of the S. C. de P. F.*, 9 Dec. 1822 (*Collectanea*, n° 779) ; decree of the C. S. O., 19 Aug. 1891 (*Collectanea*, n° 1855) ; decree of the S. C. de Sacr., 12 March, ad 4^m, where we read « quoad qualitates testium, a decreto *Ne temere* nihil esse immutatum ».

2. The decrees of the diocese of Bruges P. II. tit. II, art. 4, par. 4, say : « If the practice anywhere exists of admitting women as witnesses in the celebration of marriage, let it be abrogated, as unbecoming ».

3. It even seems probable that the priest in question would assist validly in a case in which he had not been asked to do so ; it would, however be necessary for him to ask the consent of the parties. Cf. VERMEERSCH, *Ne temere*, n° 74^{bis} ; ARRIBAS, o. c., p. 101 ; compare with WOUTERS, o. c., p. 68.

4. No regard must be had to the delegation which can be obtained only by telegraph or telephone ; but it would be otherwise if it can be obtained by letter, even by *express letter*. A probable fear of not having the requisite time for the recourse, is also sufficient. Cf. *Instructions du Vicariat de Rome*, l. c., p. 616 s.

and that the reason should be the imminent danger of death, or other motive (1).

3. Finally, there must be an urgent necessity for marrying, either for the relief of the conscience of the sick person, or for the legitimization of the offspring.

This last condition is fulfilled : a/ as often as the dying person, even apart from antecedent concubinage, is bound in conscience to marry, e.g., because he cannot otherwise remove the proximate occasion of sin, or because he has seduced a woman under a promise of marriage, or again because a marriage is the only means of sparing or restoring the good name of his accomplice (2). b/ When it is a question of rendering legitimate the birth of a child conceived out of wedlock, or of legitimating a child already born (3).

Second case. *Marriage can be validly (and lawfully) contracted before the witnesses alone, without the presence of the competent priest, whenever the engaged parties can neither send for him nor go to him without grave inconvenience, and have already waited for a full month.* ^{69.} *in the case of grave inconvenience.*

Explanation.

These are the words of the S. C. de Sacr., in the decree of the 12 March 1910, in reply to the first doubt proposed. They contain an authentic interpretation of Article VIII of the Decree *Ne Temere*, by which this notable privilege, in modification of the general discipline, is granted. The privilege consists in this :

1. Thus *Il Monitore Eccl.*, 1910, p. 137 s., reports the case of a priest who could not in conscience send for the competent parish priest or ask his delegation since it was through confession that he had become acquainted with a case of concubinage that nobody knew of. Cf. also *Coll. Brug.*, t. XVI, p. 195 ss.

2. We would not venture to say with VERMEERSCH, *Ne Temere*, n° 73, that this obligatory condition is also fulfilled « where the sick man has occasioned his accomplice (or her family) a material loss, which, according to the law of the country, can be more readily repaired if he leaves a widow behind him ; and in the case in which a marriage would put an end to an inveterate family quarrel, or prevent a patrimony from being turned to a bad use ».

3. This affects *natural* illegitimate children, those whom a subsequent marriage legitimates of itself ; indirectly it affects other bastards who are born neither of an adulterous nor of a sacrilegious union. The priest assisting at the marriage can, in virtue of art. VII, *in ordine ad matrimonium*, legitimate these illegitimate children with the exception of the two classes mentioned above. See below, n° 369 ; *l'Ami du clergé*, 1911, p. 713.

In order to contract marriage validly (and lawfully) *without the presence of the priest, it is sufficient* 1. that there should be a *grave inconvenience* in sending for, or in going to the competent priest, i. e., the parish priest of the place or his delegate (¹) ; 2. that this state of things should have already lasted for a *month*.

This twofold condition being fulfilled, the engaged parties can validly (and lawfully) marry without any priest whatever, *but in the presence of two witnesses* ; the law of clandestinity *does not lapse entirely*, but only for the part that it is impossible to observe (²).

Nature of
this incon-
venience.

With regard to *the grave inconvenience* :

There is no special enactment as to *its nature* ; it matters little what its nature may be, or what persons it may affect, whether the engaged parties, or the priest, provided only it be *grave* ; observe too, that it matters little whether it be *general* or *particular*, common to a whole district or not.

Up to the present, relying on the wording of art. VIII : « Si... in aliqua regione », many interpreters maintained that the privilege was applicable only in the case of a *general* impossibility, affecting the greater part of the inhabitants of a country (³) ; or, at the least, they thought it necessary to require an impossibility that in

1. Consequently, if, in default of their own parish priest (or of his delegate), the engaged parties could easily go to another parish, and be married there before the parish priest of the place, they could not make use of the privilege. On the other hand they could do so, if such an arrangement were not practicable, even though in their own parish they could go to another priest, but not to their own parish priest or his delegate. Cf. the decree of the S. C. C., 27 July 1908, ad 5^m, and compare with OJETTI, on the *Votum* to this decree, in the *Anal. eccl.*, 1908, p. 341 s.

2. The assistance of the witnesses is then subject to the general rules described in n° 67, but regard should be had to the recommendation of the S. C. de P. F., in its letter 23 June 1830 : « In this case let the parents choose two witnesses, who together with the bride and bridegroom and their relations, should go to the church, and kneeling there recite the usual acts of faith, hope, charity and contrition, that the engaged parties may thus dispose themselves suitably for the marriage. Then let the bride and bridegroom rise and express their mutual matrimonial consent in the presence of the witnesses : after having given thanks to God, let them return to their home. Should it be impossible to go to the church, let the same ceremonies be observed at home ». GASPARRI, o. c., p. 970.

3. Cf., among others, DE BECKER, *Legislatio Nova*, 1908, p. 36 ; STANDAERT, in the *Coll. Gand.*, I, p. 151 ss. ; WOUTERS, o. c., p. 75 ss.

some way *affected a region*, or extended to a whole country, though affecting only a limited number of the inhabitants ⁽¹⁾.

But at the present time, considering the text and context of the decree of 12 March 1910, it can be held as certain that any grave inconvenience, whatever it may be, even a *simply particular and individual* inconvenience, is to be taken into account, and is sufficient to legalize marriage without a priest. Not only are the terms of the Decree as wide as they can be ; but in addition to this the only word (*regio*) which caused difficulty and seemed to exclude cases of particular impossibility, is omitted ; and, what is very significant, this omission occurs in the answer to a question that was put for the purpose of ascertaining how this particular term was to be interpreted.

Application.

It is apparent therefore, that advantage can be taken of this *Application*. privilege in Belgium, France, Germany, Holland, and elsewhere, in cases in which it is important that parties should be married before the Church, *who cannot be married before the civil officer, and whose parish priest, after the lapse of a month's notice, is unable to assist at their marriage without exposing himself to the severe penalties of the Penal Code* (art. 267) ⁽²⁾.

1. We maintained the probability of this interpretation of art. VIII, requiring an impossibility affecting only a limited number of the inhabitants of a region, and not a common or general impossibility, in the *Coll. Brug.*, t. XIII, p. 647 s. and also in the first edition of the present work ; and we returned to the charge, to reply to our critics, in the *Coll. Brug.*, t. XV, p. 107 ss.

Our opinion found favour with several authors quoted in the last note of this number 69. They went even further : CARD GENNARI, *Commento* p. 72, and HEINER, *Archiv. fur K. Kirchenrecht*, 1908, p. 485, taught that at that time already, art. VIII was to be understood in the sense of *particular* impossibility. BOUDINHON, *Canon. Contemp.*, 1910. p. 264, was of the opposite opinion.

2. We proposed this application of the privilege, before the decree of the 12 March 1910, in the *Coll. Brug.*, t. XIII, p. 646 ss., and t. XV, p. 106 ss., as well as in our first edition. The text of art. VIII, seemed already to justify this interpretation. We also invoked the analogy between our case and that solved by the Holy See in favour of the island of Curaçao : in 1785 the S. C. de P. F. (*Collectanea*, n° 1515) permitted marriage to be contracted there before two witnesses only, for the reason that religious marriage was forbidden there before the civil ceremony, under the penalty of a fine of 500 florins to be paid

It would certainly be a grave inconvenience for the priest to officiate at the marriage under these circumstances (¹) ; and consequently as soon as he refuses to do so, in conformity with the law, the one condition required by the decree of the S. C. de Sacr. comes into operation. It is useless henceforward to object, as one might have done before with some show of reason, that here is no impossibility that is general or that affects the region.

We do not say that, if the parties found it impossible to fulfil the civil ceremonies before the religious marriage, this would be a sufficient reason for them to proceed at once, and on their own initiative, to marry before witnesses. The parish priest might, if he thought fit, decide to assist at the marriage either personally or by his delegate, in spite of the law and the legal consequences ; and in that case there would be no reason why the parties should not present themselves before the priest, since they are themselves exempt from any penalty under the provisions of the Code. It is necessary, therefore, that the parties, after having duly invited the competent priest, should assure themselves that he refuses his assistance, and that they should allow a month to elapse before marrying (²). It is in like manner necessary that there should be

by the parish priest, while Catholics had to pay 50 florins for the celebration of the civil marriage.

A question, however, had already been addressed to the S. C. C. on this subject : « Should provision be made, and how, for the case in which the civil law forbids the parish priest under heavy penalties to assist at a marriage of the faithful before the civil ceremony, when this cannot take place, and, nevertheless, the celebration of the marriage is absolutely necessary for the salvation of souls ? » To this question the Congregation replied, 27 July 1908 : « *non esse interloquendum* » (i. e., there is no answer). It was unwilling to solve this doubt directly and explicitly, perhaps, out of consideration for the civil authority.

1. Cf. *Coll. Brug.*, t. XIII, p. 614 and 648.

2. The only person to be invited with a view to his assisting at their marriage, either personally or by his delegate, within the limits of his own territory, is the parish priest (or Ordinary) of the parties. Other parish priests are, indeed, competent to assist validly within their respective territories, but it would be a grave inconvenience to go and sound them on the subject, and besides, they would have the same grave reason for refusing to officiate as their own parish priest.

no canonical impediment, in consequence of which the parish priest might have declined to officiate.

Such are the wise precautionary measures necessary to prevent the abuses that would not fail to result from marriages of this kind, if people could have recourse to them without first notifying the parish priest or the Ordinary, or if any refusal whatever on the part of the parish priest, even for canonical reasons, were sufficient to justify them. On the other hand this solution is well adapted for avoiding the penalties levelled against those who infringe the law requiring the precedence of civil marriage; it affords the best remedy for the grave evils consequent on this law, not only in the case of marriages *in extremis*, in favour of which the penalty is abrogated in case of urgency, but also in many others (¹).

The interpretation we have just proposed of art. VIII *Ne temere*, and of the decree of 1910, we do not impose it as being absolutely certain; however, it does not appear easy to deny its *solid probability*. Thence, we may, till ampler information, apply it by virtue of the principles further enunciated in n° 240: in case of any doubt regarding the law (*dubium juris*), as to the existence of an impediment of the ecclesiastical law, the Church supplies (²).

1. For further particulars see below, nos 230, 231 and 232, and the *Coll. Brug.*, t. XV. p. 105 s., where will be found, in addition to the cases in which the present solution is applicable, an interpretation of the penal clause, from which it will appear that neither the parish priest who counsels such a course, nor the witnesses who assist in his absence, are liable to any penalty.

2. Here the list of authors sharing the same opinion: OJETTI, who first of all proposed it in his commentary *Jus Pianum*, n° 122, and supported it in the *Votum* which has been spoken of, as also in his *Synopsis*, v° *clandestinitas*, n° 1135; VERMEERSCH, *De Religiosis-Periodica*, IV, n° 272 ss.; VAN DEN ACKER, o. c., p. 79 ss.; STANDAERT, in *Collationes Gandavenses*, II, p. 187 ss., where he retracts his former contrary sentence; DE ARQUER, *novissima disciplina sopra Esponsales y Matrimonio*, 2^a ed., Barcelona, 1910, n° 284, and in *Supplemento* (1911), n° 8; CHOUPIŃ, o. c., p. 163 s.; TRENTA, o. c., n. 98 s.; Dr KAAS, in *Pastor Bonus*, 1911 (November), p. 111; and especially WERNZ, *Jus Decretalium*, 2^a ed. (prepared by *Laurentius*), IV, p. 300; ARRIBAS, o. c., p. 111, where, however, he practically advises the recourse to the Holy See, in a particular case. We have not found any others sharing a contradictory

Observe that according to the solution of doubt 3, in the decree in question, the privilege may be used even by those who are quite able to obtain the services of a competent priest in the place in which they reside, but who deliberately, and *for the purpose of evading the general law*, betake themselves to a place where there is not one.

There still remains to observe that in case of art. VIII, it is not required that the witnesses should have been invited to assist at the marriage, nor that they request the consent of the contracting parties.

70.
Marriages by proxy.

Note. Under the new legislation of Pius X, as under that of the Council of Trent, marriages *by proxy*, and also *by letter*, are still permitted ⁽¹⁾.

In these two cases, one at least of the parties must first invite the assistance of the parish priest. Then it is necessary, in the former case, that the proxy should, in the name of his principal, express consent in the presence of the parish priest, who asks it, and of two witnesses ⁽²⁾. In the second case WOUTERS proposes the following procedure : « The parish priest... in the presence of the witnesses asks the consent of the party present, and he writes to the other party to ask his (or her) consent in the name of the party present ; the absent party writes in reply that he accepts the consent of the other party, and that he gives his own ; finally the parish priest reads this letter in the presence of the party present and of the same witnesses, and the consent of the absent party is accepted by the other » ⁽³⁾.

opinion, except DE BECKER, in *The American Coll. Bulletin*, 1911, p. 35 ; Boudinhon, *Canon. contemp.*, 1910, p. 264, and FERRERES, *Los Esponsales y el Matrimonio*, 5^a ed., Madrid, 1911, n^o 806. WOUTERS, o. c., 3rd ed., proves rather favourable to them, but speaks with less assurance.

1. Cf. GASPARRI, o. c., n^{os} 834, 835, 837 and 832 s. ; *Anal. eccl.* 1901, p. 430 ; GENNARI-BOUDINHON, o. c., 1^e P., cons. 135 ; ESMEIN, o. c., n^o 212 ss. See also the *Causa Ravenn.*, decided 19 Jan. 1910 by the S. Rota, concerning a marriage contracted by letter under the discipline of the Council of Trent ; *Canon. Cont.*, 1910, p. 366 s. ; *N. R. Th.*, p. 449-464.

2. There must be a *special* mandate which accurately *specifies* the person to be taken in marriage ; it is also necessary that the intention of the principal should persevere, at least *virtually* ; but it matters little if, at the exact moment that the consent is given by the proxy, the principal should be asleep, or absorbed in other occupations, or even for the moment mad.

3. Cf. *Ned. Kath. Stemmen*, 1910, p. 86, and WOUTERS, o. c., p. 461, where will be found the manner of proceeding in the case in which neither of the

SECOND POINT. FORMALITIES REQUIRED IN ORDER THAT MARRIAGE MAY BE LICIT.

I. General rule.

FIRST PROPOSITION. *Except in case of grave necessity, the marriage, in order to be licit, must take place before the parish priest (or the Ordinary, or the delegate) who should at the same time be the parish priest of the parish in which he assists at the marriage and the particular parish priest of one of the contracting parties, or provided with the permission of the same ; the rule is, also, that the marriage should be celebrated before the parish priest of the bride, unless there is some good reason to the contrary.*

71.

Formalities that make the marriage licit.

The parish priest (or the Ordinary) whose business it is to see to the celebration of the marriage, is the parish priest of the place in which the parties have their domicile, or in which they have resided for a month.

As a general rule,

Explanation.

A. In order that the marriage may be *licit*, it is necessary that (the Ordinary or) the parish priest of the parish in which the marriage takes place, and before whom (or before whose delegate) it must be celebrated in order to be valid, should be *at the same time the particular parish priest* of one of the contracting parties ; or if he is not, that he should have received *permission* from the Ordinary or parish priest of the parties, except in the case of grave necessity.

the presence of the particular parish priest is required, or that of another, with the permission of the former ;

This *permission* is not a delegation properly so called, like that of which we have spoken above in the first point, and consequently it is not subject to the conditions there enumerated ; thus it is sufficient that it should be tacit or even presumed, and it may be given to a priest not specified by name (¹). In case of *grave necessity* the permission may be dispensed with ; as for instance,

engaged parties is present. See also the *Causa Ravenn.*, to which we have referred above.

1. Thus also the parish priest of the parish in which the marriage is to take place, who has received from the parish priest of the parties permission to assist thereat, can transfer this permission to his delegate without having received any general permission or special faculty to do so.

when, for serious reasons, the marriage cannot be postponed until the permission has been obtained ; such a case would be the discovery of an error as to domicile at the very moment that the marriage is about to take place ; or, again, the necessity of concealing the celebration of the marriage from the parish priest of the parties.

the parish priest of the bride, rather than that of the bridegroom, ought to assist at the marriage.

B. It is sufficient, in accordance with what has been said, that he who assists at the marriage should be the particular parish priest of one or other of the contracting parties, or at least that he should have obtained his permission ; nevertheless, *as a general rule*, it is the parish priest of the bride who should assist ; it belongs rather to him to officiate, or to give permission to another to do so ⁽¹⁾. This rule, however, is not strictly obligatory, and *any legitimate reason* would justify its non-observance : such occasions are of frequent occurrence ⁽²⁾.

72.
The particular parish priest in this matter

C. **The Ordinary** or the **particular parish priest**, with relation to the celebration of marriage ⁽³⁾, is the Ordinary or the parish priest of the place in which the engaged parties have their **domicile**, or in which they have **resided for a month**.

Thus in order that one should have an Ordinary or a particular parish priest, it is necessary and sufficient that he should have acquired in the diocese or parish in question either a domicile, or a month's residence.

is the parish-priest of the domicile,

1. *The Domicile*

is acquired either by one's own will, when it is termed, domicile *in fact* ; or by the will of another, in virtue of a legal provision, when it is termed, domicile *in law*.

1. If the bride is not a Catholic, it is better to apply to the parish priest of the bridegroom. See also what we say below, at the end of n° 73 with regard to *vagi*.

2. These are the provisions of the common law, but they do not prevent particular diocesan decrees from being strictly obligatory on this point, as is the case in the diocese of Bruges, *Stat. dioc.*, ed. 2^a, P. II, tit. II, art. 4, par. 4. There any legitimate reason whatever does not serve as an excuse for not observing the rule.

3. The present signification of the term : particular parish priest (*parochus proprius*), in the matter of assistance at marriage, must not be transferred or extended to other matters ; not even, it would seem, as we have remarked above in n° 36, to the publication of banns.

Domicile in fact is acquired by those who are majors or emancipated, by actual residence in a place, with the intention of remaining there permanently, if nothing happens to call them elsewhere (1). From the moment that these two elements are united the domicile is constituted. This intention is manifested either by words, or by acts, inferring it by various indications (2). *Domicile in fact is not lost* by change of residence, provided one has the intention of returning to his former parish and of remaining there, nor by the mere intention to remove without actually doing so; but it is lost when both these conditions are at the same time fulfilled, that is to say, by actual departure without the intention of returning.

whether in fact,

Domicile in law especially concerns minors. In canon law, *they have* the same domicile as their father, or, in his default, the same as their mother or guardian. They lose their domicile in law, when, after having attained their majority or having been emancipated, they positively renounce it. During their minority their will cannot effect this, but as soon as they are of age or duly emancipated, they have the power to renounce their domicile in law. At the same time it remains their domicile until they do effectively renounce it, and they are not considered to lose it by the very fact that they are of age or have been emancipated: but that renunciation is obtained by the fact of withdrawal, joined with the intention of not returning to the paternal domicile, just in the same way as the domicile in fact is lost, since the legal domicile acquired during minority, becomes the voluntary domicile on attaining majority (3).

or in law,

1. Cf. BASSIBEY, *De la Clandestinité*, nos 53,70 ss. Consult also the *Causa Parisien.* of 24 May 1911 (A. A. S., III, p. 324 ss.), in which is quoted a decree of 12 May 1875 concerning certain persons who appear to have two domiciles, viz., a business domicile and a family domicile. The decree declares that in such a case there is only one real domicile, the last named, in which the night is passed.

2. The fact of a ten years' residence carries with it a presumption of this kind; the taking up of an office implies that one is seeking a fixed abode, and so forth. Cf. the *Causa Ravennaten.*, 15 May 1911, in the A. B. S., III p. 488.

One and the same person can have two domiciles, if he lives by turn in, two parishes and has the intention of continuing to do so, passing about half of the year in each.

3. On the subject of this domicile in law, see the *Causa Ravennaten.*, of

2. The month's residence.

or the parish
priest of the
parish in
which the
parties have
been living
for a month.

The month's residence consists in a stay ⁽¹⁾ for thirty consecutive days in the same parish, without reference to the intention of the engaged parties. There is no reason why they should not be away for a few hours, or even make it a practice to absent themselves during the day, provided they pass the night there. There must be the full thirty days, but the thirtieth day, once begun, may be counted as complete, and so on the thirtieth day the marriage may lawfully take place before the parish priest of the place ⁽²⁾.

This month's residence, in the matter of the celebration of marriage, *has taken the place of the quasi-domicile* ⁽³⁾ heretofore

15 May and 29 Dec. 1911, in the *A. A. S.*, III, p. 483 ss., especially p. 485-490 and 495, and IV, p. 327 ss., and compare with the *Collat. Brug.*, t. XVI, p. 704 ss.; see further the *Causa Parisien*, 27 Jan. 1912, in the *A. A. S.*, IV, p. 277 ss., and the dissertation which we have written in the *Coll. Brug.*, t. VIII, p. 348-357, compared with t. XII, p. 157 s.; we have there treated the question point by point, with explanations and proofs, and have given in detail the conditions required for the renunciation of this domicile. Read also the numerous authors quoted there: *R. th. fr.*, 1903, p. 724 ss.; BASSIBEX, *Cland.*, n° 75; *Canon. Cont.*, 1902, p. 483, with the case solved before the S. C. C. 27 Dec. 1901; *Ned. Kath. Stemmen*, 1906, p. 82; *Th. Pr. Quartalschr.*, (Lintz) 1901, p. 129 s.; *Pastor Bonus*, 1907, p. 204 ss. and 392 ss.; *Anal. eccl.*, 1907, p. 238; FOURNERET, o. c., p. 191 ss.

1. It seems that a real residence is necessary, a dwelling properly so called, as distinct from a sojourn that a mere tourist or *vagus* might make in a place. This is clear from the decree of the C. S. O., dated 24 March 1867, the text of which is given in the *Coll. Brug.*, t. IV, p. 184.

2. For the month's residence it is not necessary to distinguish, as in the acquisition of a domicile, between majors and minors, between those who are their own masters and those who are dependent on others; by means of the above mentioned residence all can of themselves become the parishioners of a particular parish priest. The same may be said with regard to the quasi-domicile, as far as that is still recognised.

3. This substitution is not clearly set forth in the Decree *Ne Temere* itself, as we have shown at length in our Commentary, and as several distinguished commentators have recognised, such as BESSON, *N. R. Th.* 1908, p. 80 ss.; OJETTI, *Fus Pianum*, n° 95, and also the *Consultor in Voto* for the Decree of 28 March 1908, in the *Anal. Eccl.*, 1908, p. 124. But the doubt that existed has been removed by the S. C. C. in its decree of 28 March, ad 5^m, (in the *Coll. Brug.*, t. XIII, p. 467 ss.). To this decree the S. C. de Sac. referred anew, 10 March 1910, sub 5°.

required, in default of a domicile, in order to qualify one as a parishioner for the purpose of marriage; and this is why we have defined the particular parish priest, in this respect, as the parish priest of the parish in which the engaged parties have a domicile, or a month's residence. The *quasi-domicile* was acquired, and is still acquired, as far as in other matters it remains in force, by actual residence in a parish with the intention of remaining there for the greater part of the year. This intention was presumed, it is true, from the fact that the residence had already lasted a month, but this was only a presumption of the law (*juris tantum*), and by no means a presumption that did not admit of proof to the contrary, (*juris et de jure*), except by special privilege, such as obtained in the United States of America. On the other hand, if this intention was wanting, an actual residence of six months did not constitute a quasi-domicile (¹).

Note. 1. The place in which it is necessary to have a domicile, or a month's residence, in order that one may have a particular parish priest or Ordinary, is the *parish*. The Bishop is not considered to be the particular Ordinary of the engaged parties, unless they have been domiciled, or have resided for a month in a determinate parish of his diocese; it does not suffice if they travel about from place to place within the limits of the diocese. *The reason* of this is, that up to the present, in canon law, no account was taken of the domicile or quasi-domicile that was not *parochial* (²), just as the Roman law considered only domicile in a *municipium*; and the new discipline seems to have left this provision of the law unchanged (³).

73.
By 'place' is
here under-
stood parish.

1. The regime of the *quasi-domicile*, under the Tridentine discipline, is explained at length in the *Coll. Brug.*, t. V, p. 306 ss.; t. IV, p. 182 ss.; t. X, p. 603; and in the documents and authors there quoted. See also the *Anal. eccles.*, 1902, p. 153, in the *Causa Paris.*, 20 April 1902; 1903, p. 287; 1905, p. 193 and 339 ss.; the *Canon. Cont.*, 1905, p. 502 ss. the *Rev. eccl. de Metz*, 1905, p. 552.

2. Cf. the Decree of the C. S. O. of 9 Nov. 1898, quoted above in n° 64, and given in the *Coll. Brug.*, t. IV, p. 244 ss.; FOURNERET, o. c., p. 147-166.

3. Cf. OJETTI, o. c., n° 96; VERMEERSCH, *Ne Temere*, n° 59; FERRERES, *Los Esponsales*, n° 251; CREAGH, o. c., p. 46; VOGT, o. c., p. 62; BARRETT, o. c., p. 35; CHOUPIN, *Ne Temere*, n° 38 and 41. — DE BECKER, *Ne Temere*, p. 39 s. admits the same for the domicile, but not for the month's residence, agreeing therein with VAN DER BURGH-SCHAEPMAN, o. c., p. 281 s.; DE ARQUER, o. c., n. 150

With regard to those who dwell on the *confines of two parishes*, see FÈYE, *de Imp.*, n. 229, ad 5^m; *R. th. fr.*, VI, p. 612; DESHAYES, *Questions pratiques sur le Mariage*, p. 11-14; BASSIBEY, *De la Cland.*, n° 68; *Coll. Brug.*, t. V, p. 688 s. with the passages quoted. Here it is sufficient to say that such persons belong to the parish on which the principal door of their house opens, unless the Bishop has made any provision to the contrary. If they subsequently change the principal door in such a manner that it opens on to the other parish, the domicile is not changed thereby, unless the house is at the same time reconstructed or the whole arrangement of it altered.

2. The parish priest of the parish in which the engaged parties have only a month's residence can licitly assist at their marriage, as well as the parish priest of the parish in which they have a true domicile. Nevertheless, as DE BECKER remarks (*Ne Temere*, p. 40), this latter can lawfully officiate even if his parishioner does not at the time reside in his parish, provided the marriage takes place in his territory, while the former is only competent to do so in the case of parties residing in his parish at the time of the marriage.

Vagi.

3. For *vagi*, that is to say, for those who have neither a domicile nor a month's residence in any place (¹), the assistance of the parish priest is licit, (subject to what we shall say below in the second proposition), as often as it is valid, viz., whenever they contract marriage before the priest of the parish in which they are for the moment residing. For all that concerns the celebration of marriage, the parish priest of their actual place of sojourn occu-

and 167, *Theol. Mechl* o.c., p. 316, and CRONIN, t. c., p. 183. — STANDAERT, *Coll. Gand.*, t. II, p. 191 s., and WOUTERS, o. c., p. 51, are content with the domicile and with the month's residence in *the diocese*; the *Instructions du Vicariat de Rome*, l. c., p. 611, seems to adopt this opinion.

1. Certain interpreters of the law are wrong in still reckoning as *vagi*, those who have a month's residence in a determinate parish, but no fixed domicile or quasi-domicile in any place. Since the month's residence has been substituted for the quasi-domicile such persons are no more *vagi* than were those who possessed a quasi-domicile under the Tridentine discipline. A solution in this sense was given to a doubt laid before the S. C. de Sacr., 12 March 1910, ad 5^m. On the other hand, a person who has no domicile, but fixes his residence in a certain place, with the intention of remaining there for the greater part of the year, must be regarded as a *vagus* until his residence has lasted for a month.

pies for them the same position as the particular parish priest of ordinary parishioners.

If *one* of the parties only is a *vagus*, it seems more in conformity with the law that the marriage should take place before the parish priest of the other party, though this is, perhaps, not strictly requisite (¹).

Observation. From all that goes before it can be seen what *change* the law of Pius X has introduced into the form of the nuptial contract formerly imposed by the Council of Trent. Under the Tridentine discipline which, as we have said, serves as the norm for all marriages contracted before Easter 1908, the very *validity* of the contract depended on the presence of the *particular* parish priest, and his competence was not limited to his own territory, but extended everywhere in respect of his parishioners; the particular parish priest was the parish priest of the domicile or quasi-domicile. *At the present time* the presence of the particular parish priest is no longer required, except for the purpose of rendering the marriage *licit*, and the month's residence has taken the place of the quasi-domicile; thus an end is happily put to many perplexities.

74.
Difference
between the
new legisla-
tion and that
of the Council
of Trent.

SECOND PROPOSITION. *Before the Ordinary or the parish priest (or their delegate) can assist at a marriage, they must first assure themselves that the contracting parties are free from any impediment, and especially from any matrimonial tie. In the case of vagi, except in a case of special necessity, the parish priest must first obtain permission from the Ordinary or from the priest deputed for this purpose.*

Explanation.

The first of these conditions calls to mind that provision of the common law, which forbids anyone to proceed to the celebration of a marriage before he is assured of the absence of any impediment, and especially of that of an existing marriage (*ligamen*) (²).

75.
Before assist-
ing at a mar-
riage the
parish priest
must assure
himself that

1. It is evident that the parish priest of the place in which the *vagus* is dwelling, who, as we have said, is reckoned as his particular parish priest, possesses only imperfectly the qualifications of the particular parish priest required by the spirit and object of the law for licit assistance at the marriage. Accordingly, when the bride is a *vaga*, the parish priest of the bridegroom should be preferred, notwithstanding the general rule given above at the end of n° 71.

2. See below, nos 330 and 332, together with the Instr. of the S. C. de Sacr.,

The *second condition* is a reproduction of the statute of the Council of Trent ⁽¹⁾, prohibiting parish priests from assisting at *the marriage of vagi* « without having first referred the matter to the Ordinary, and obtained his consent », as a precaution against polygamy. The new discipline excepts the case of necessity, that is to say, when there is a grave reason for celebrating the marriage at once, without incurring the delay consequent on recourse to the Ordinary. The Ordinary, under the new discipline, is empowered, not to say advised, to delegate certain priests, e. g. the deans, to decide these cases and give the requisite permission, in view of the fact that priests can more readily have recourse to their respective deans.

By *vagi* we must here understand, it seems, not those who are such *merely for the moment*, because they have just given up their domicile (or month's residence), but have the intention of shortly acquiring another; but only such as lead a wandering life, without any fixed abode, and make no continuous stay in any place for a month at least ⁽²⁾.

II. Exceptions.

76.
*Exceptional
cases.*

In the two exceptional cases (the danger of death, and the impossibility of obtaining a priest) mentioned above in the first point, the formalities that suffice for the validity of the marriage, suffice also for its *licit* celebration.

of 6 March 1911, the text of which we give at the end of this work. See also the S. C. C. of 1 Feb. 1908, where to *dubium 11^m* : « An a decreto *Ne Temere* abolita sit lex vel consuetudo in nonnullis diocesisibus vigens, vi cujus a curia episcopali peragenda sunt acta, quibus constet de statu libero contrahentium, et dein venia fiat parochis assistendi matrimonii », the answer is given : « Servetur solitum ». Cf. CHOUPIN, o. c., p. 156 s.

1. Sess. XXIV, *De Reformatione Matrimonii*, cap. VII.

2. Cf. *Coll. Brug.*, t. II, p. 495; DE ARQUER, o. c., n. 184; FERRERES, *Los Esponsales*, n. 254, 271, and 499; KIEFER, o. c., p. 9; CHOUPIN, o. c., n. 46; BARRETT, o. c., p. 39; CREAGH, o. c., p. 48; PEZZANI, o. c., p. 118. — WOUTERS, o. c., p. 54 s., is of a contrary opinion; also DEVINE, o. c., p. 304; BESSON, in *N. R. Th.*, 1911, p. 271 s.; ARRIBAS, o. c., p. 75 s.; LEITNER, *Ne Temere*, p. 41 s.

SECTION II. LIMITS OF THE NEW LAW.

I. PRINCIPLES.

77.
Principles :

First Principle. *The Decree Ne Temere extends to all countries.*

It is considered as promulgated by the very fact of its transmission to the Ordinaries, and even by the very order for its transmission : consequently without waiting for the moment of arrival at its destination, and without troubling to ascertain if, by an oversight, it has not been sent to one or the other Ordinary ⁽¹⁾.

Second Principle. *The Decree Ne Temere applies to all baptized persons, except a/ non-catholics, b/ Catholics of the Oriental rite.*

a) the decree
extends to all
countries ;b) it concerns
all Catholics
of the Latin
rite ;

By non-catholics are here ⁽²⁾ understood those only who have not been baptized in the Catholic Church, and have never been converts to it, whether they be at present heretics or schismatics, Latins or Orientals ⁽³⁾. Accordingly Catholics are here « all those who have been baptized in the Catholic Church or have been converted to it whether from heresy or schism, though they have subsequently become apostates or unbelievers ».

Hence, in accordance with the circular of the Bishops of Hungary, of 16 March 1909, those who are to be reckoned as Catholics, in the sense of the Decree *Ne Temere*, are « a/persons

1. His Holiness Pius X has herein derogated from his own Constitution *Promulgandi*, by which he had recently reformed the traditional method of promulgation of the decrees and laws of the Holy See. Formerly this was done by affixing to the doors of the Greater Basilicas of the Eternal City : the Constitution of Pius X has replaced this affixing by the insertion and publication of the decrees in the official commentary of the acts of the Apostolic See.

The promulgation of the chapter *Tametsi*, by the express order of the Council of Trent, was also made in a way that derogated from the traditional method. The Fathers of the Council ordained that publication should be made in *each parish* separately, and that « it should come into force for each parish one month after the first day that the publication of it had been made there ». Cf. *Coll. Brug.*, t. XII, p. 568 s.

2. We say *here*, because this cannot be applied indiscriminately to other matters, notably to the determining of a mixed marriage ; for that, it seems, we must still apply, saving the restriction of which we speak at the end of n. 79, what was laid down by the C. S. O., 6 April 1859. (*Coll. Brug.*, t. III, p. 580). See below n° 252.

3. Decr. S. C. C., 28 March 1908, ad 2^m.

who have been baptized and educated in the Catholic religion, and have never been separated from it ; b/ persons baptized as Catholics without having ever practised the Catholic religion (1) ; c/ persons baptized as Catholics, but who have afterwards fallen into heresy or schism ; d/ non-catholics, baptized as such, who, after conversion, have again fallen away » (2).

The following are regarded as *baptized in the Catholic Church* : firstly, *infants*, who at the wish of their parents or guardians are carried to the baptismal font of the Catholic Church, or who, being born of Catholic parents, have been baptized by a laic in case of necessity ; secondly, *adults* (of seven years, or over), who of their own will have presented themselves for baptism before a Catholic minister, or in case of necessity before any other person whatever (3). Infants baptized as non-catholics and still below the age of reason, whom their convert parents cause to be brought up and numbered as Catholics, may also be reckoned as *converts from heresy or schism* (4).

All Catholics living in the East are not the *oriental Catholics* exempted by the Decree, but only those who belong to the *Oriental rite*. These last have been declared exempt by the S. C. C. under date of 1 Feb. 1908, ad 1^m (5).

1. See, however, the decree of the C. S. O., of 31 March 1911 (A. A. S., III, p. 163 s.) ; where we find that recourse is to be had to the Holy See in particular cases, whenever there is question of a marriage to be contracted by one baptized as a Catholic, but born of infidel or non-catholic parents, and brought up from infancy in heresy or infidelity. Cf. *N. R. th.*, 1911, p. 411 ss.

2. Cf. *Archiv. f. k. Kirchenr.*, 1909, p. 716 ss.

3. Cf. VERMEERSCH, *Ne Temere*, n° 87 ; VANDERBURGT-SCHAEPMAN, o. c., nos 304 ss.; *Theol. Prakt. Quartalschr.*, 1912, p. 107 s.

4. Cf. VAN DEN ACKER, o. c., p. 94 s. This author, p. 96, denies the parity of this case with that of an infant baptized as a Catholic and inscribed by its parents in a non-catholic sect ; in this latter case, he says, the child should not (save recourse to the Holy See) be considered as a non-catholic, on the ground that *odiosa sunt restringenda*.

5. Cf. *Coll. Brug.*, t. XIII, p. 298 ss. and also the note on p. 186, where we observe that this exemption is in conformity with the general line of conduct that prevails where the Orientals are concerned. As a matter of fact they are not bound by new papal Constitutions except « a/ in the matter of dogmas of faith ; b/ in the case in which the Pope explicitly mentions them and issues decrees in their regard ; c/ where Constitutions bind them implicitly, as, for instance, in the matter of appeals to a future Council », that is to say, they are forbidden,

Third Principle. *The exemption of one of the contracting parties is not shared by the other.* c) the exemption is not shared.

The contrary principle was in force under the Tridentine discipline. As a general rule (1) the exemption of one of the parties sufficed to withdraw the marriage from the law of clandestinity. This privilege, as the Consultor for the decree of the S. C. C., of 28 March 1908, observes in the *Anal. eccl.*, 1908, p. 121 s., was not a logical consequence of the nature of the marriage, nor of the nature of the law annulling marriages celebrated without the required form. It had its origin solely in the positive law; and we must admit that the new discipline is more conformable to the nature of the contract, which requires the competency of both parties, as well as to the nature of the law, which determines the form under which the marriage must take place.

The abrogation of the privilege follows from art. XI, § 2 of the Decree *Ne Temere*, and from the solution of doubt 1, given by the S. C. C., 28 March 1908. The Decree says: « They (the above laws) are also binding on the aforesaid Catholics, if they contract.. marriage with non-catholics, whether baptized or unbaptized, even after having obtained a dispensation from the impediment of mixed religion or of disparity of worship ». Again, to the proposed doubt: « Is a marriage contracted by a Catholic of the Latin rite with a Catholic of the Eastern rite, without the form appointed by the Decree *Ne Temere*, valid? », the S. C. C. answered in the negative.

equally with the Occidentals, to appeal from a decision of the Pope to a future Council, seeing that this prohibition rests on the dogma of the sovereignty of the Roman Pontiff. But none of these cases is verified in the present instance. Cf. *Collectan.*, n° 1999; OJETTI, *Jus Pianum*, nos 133 and 134. In this latter number the author observes that the Orientals, with rare exceptions, are not even subject to the Tridentine discipline. See also VERING, o. c., p. 873; *Theol. Prakt. Quartalschr.*, 1911, p. 365 ss., where the condition of the Ruthenians in this matter is described., coll. p. 905, where is given the decree of the S. C. de P. F. pro Neg. Ritus Orient., 5 May 1911, in virtue of which the decree *Ne temere* is extended to the Ruthenian dioceses of the Galacian province, but not to the others, in particular not to the Ruthenians of Hungary.

1. Except for the island of Malta. There, by a decree of the S. C. for Extraordinary Affairs, of 12 Jan. 1899, and by a decree of the C. S. O. of 3 June 1892, the present law on this point was already in force. See the Author's *Commentarius* at the foot of page 41.

From these principles we naturally deduce :

II. APPLICATIONS AND RULES.

78.

Applications
and rules.

FIRST RULE. *Latin Catholics* (in the sense indicated), *who marry among themselves, are subject to the decree Ne Temere throughout the entire world, and consequently they are everywhere bound to observe, for the validity of their marriage, the formalities described above.*

SECOND RULE. *Infidels, non-catholics* (in the sense indicated), *Oriental Catholics, who marry among themselves⁽¹⁾ in any way whatever, are nowhere⁽²⁾ subject to the Decree.*

THIRD RULE. *The Latin Catholic who marries an infidel, or a non-catholic, or an Oriental Catholic, is bound by the prescriptions of Pius X, even if he (or she) has previously obtained a dispensation from disparity of worship, or from mixed religion.*

This third rule is the application of the third principle, and it is strictly binding, *even if a dispensation has been obtained in advance...*; in other words, the Church, in giving a dispensation from mixed religion or disparity of worship, is not considered to dispense thereby from the impediment of clandestinity, though, as a general rule, as we shall point out below, in dispensing from disparity of worship, she also explicitly dispenses the Catholic party from all impediments from which the infidel party is exempt.

III. EXCEPTIONS.

79.

Exception in
favour of the
German Em-
pire and Hun-
gary.

Up to the present an exception to this discipline has been made in two instances ; the one in favour of the *German Empire* ⁽³⁾, the

1. *Among themselves*, that is to say, an infidel with an infidel, or with a non-catholic, or with an Oriental Catholic, and *vice versa*.

2. Their exemption is universal, geographically speaking.

3. In the Decree *Ne Temere*, in accordance with the text of art. XI, § 2, quoted above, there is inserted a derogatory clause « *Unless the Holy See have determined otherwise for any particular place or country* ». This clause has been understood differently by different authors (cf. *Comment.*, p. 42 ss.) ; but the S. C. C. interpreted it from the first in a restricted sense, and applied it only to the German Empire, and, indeed, only to those born in Germany and marrying there. The following doubt was proposed to the S. C. C. : « Does art. XI, § 2... include the Constitution *Provida* of Pope Pius X alone, or does it likewise include the Benedictine Constitution and other indults of this kind concerning the impediment of clandestinity ? ». It replied, 1 Feb. 1908, ad 4^m : « It includes only the Constitution *Provida*, and no other decrees whatever : after consulting His Holiness, and *ad mentem* ».

other in favour of the *Kingdom of Hungary* (1), to the effect that *mixed* marriages contracted there are *not subject* to the Decree *Ne Temere* (2).

Observe, 1° that this exception does not apply to betrothment, but to *marriages* only ; 2° that according to the most probable opinion, it is to be restricted to *mixed marriages in the strict sense* only, that is to say, to marriages between Catholics and baptized non-catholics, not between Catholics and infidels. These last are not included in the Constitution *Provida* (3), the provisions of which, apart from explicit restrictions, are preserved and sanctioned in the exception, as is clear from the answers given. 3° Observe that the *non-catholic* party is to be understood in the sense of the Decree *Ne Temere*, and not in the sense received under the Tridentine discipline. This is authoritatively taught by the S. C. C. in its decree of 1 Feb. 1908, ad 5^m (4), and with

1. The privilege of exemption was extended to the Kingdom of Hungary by the S. C. de Sacr., 27 Feb. 1909, having regard to the peculiar circumstances which are set forth in *Archiv f. k. Kirchenr.*, 1908, p. 763 s. See the text of the decree in the *Coll. Brug.*, t. XIV, p. 561 s., as well as p. 490, where is given the decree of the S. C. C., of 8 July 1908, refusing an extension of the same privilege to the Russian Empire and to the part of Poland subject to Russia.

Note that, according to the express reply of the secretary of the S. C. de Sacr., of the 5 March following, « under the name of the Kingdom of Hungary are comprised not only Hungary proper together with Transsylvania, but also the countries annexed thereto, that is to say all the lands appertaining to the Crown of Saint Stephen, consequently Croatia, Slavonia, the city of Fiume, and so all places at present subject to the Apostolic King » (Circular letter to the Bishop of Hungary, 18 March 1909). Cf. LEITNER, *Ne Temere*, p. 88 s. Observe also, according to the text of the decree of 27 Feb. 1909, that all mixed marriages contracted up to that time in the Kingdom of Hungary, after the publication of the Decree *Ne Temere*, without the prescribed form, are validated *in radice*.

2. For these marriages clandestinity does not constitute a *diriment* impediment, but it constitutes an *impedient* impediment. Cf. Constit. *Provida*, in LEITNER, *Konst. Provida.*, and the *Collat. Brug.*, t. XI, p. 285 ss.

3. See the text of the Constitution and its interpretation l. c.

4. To the doubt proposed : « Must Catholics in the German Empire, who have gone over to heresy or schism, or who, after being converted to the Catholic Faith, have subsequently renounced it, even in their youth or infancy, observe the conditions prescribed by the decree *Ne Temere*, in order to contract valid marriage with a Catholic ? », the S. C. C. gave an *affirmative* answer.

Cf. PRÜMMER, in *Theol. P. Quartalschr.*, 1912, p. 108 s., where, in the solution of a practical case, he notes the different application of the Constitution *Provida*,

reason, since it is important to give to the word *non-catholic* the same acceptation here that it has in the Decree *Ne Temere*. 4° The exception must be interpreted strictly. Thus, in the first place it holds good only for marriages contracted in Germany and in Hungary *between parties who are both natives of Germany, or both natives of Hungary* (1); in the second place, the derogation made for Germany must be taken and applied independently of that made for the Kingdom of Hungary, and *vice versa* (2).

Moreover, this two-fold derogation is regarded as a *temporary* concession and as a provisional indult (3).

before, and *after* the decree of 1 Feb. 1908, (which must be brought into practice from Easter following thereupon) in particular as regards the marriage of a Catholic with a non-catholic, baptized as a Catholic but before the age of seven brought up in a non-catholic sect. A marriage of this kind under the *Provida* discipline is valid, if it was contracted before that date, since the aforesaid decree has no retrospective force, but it is invalid if contracted at a subsequent date.

1. In answer to the following doubt : « Must the exception, introduced for Germany by the Constitution *Provida*, be considered as purely *local*, or also as *personal* ? », the S. C. C., 28 March 1908, ad 3^m, declared : « The exception holds good only for those who, being *natives* of Germany, contract marriage there : after consultation with His Holiness ». The decree of 27 Feb. 1909 adds that this declaration is to be applied in the case of Hungary also. Persons born in Alsace and Lorraine, before the annexation of these provinces to the Empire are considered as being born in Germany. Cf. BÖCKENHOFF, *Ne Temere*, l. c., p. 199.

Moreover, the S. C. de Sacr., 15 June 1909, ad 1^m, interpreted the answer of the S. C. C., given 28 March 1908, in this sense : « the parties must *both* be born in Germany, or *both* in the kingdom of Hungary ». See the *Coll. Brug.*, t. XIV, p. 489 ss., where will be found an account of the state of the controversy before this authoritative interpretation.

2. Decree of the S. C. de Sacr., 18 June 1909, ad 2^m et 3^m, l. c. Whence it follows that engaged parties both born in Germany, cannot validly contract a clandestine mixed marriage in Hungary, and *vice versa*. Moreover, if one of the contracting parties is born in Germany and the other in Hungary, they cannot contract a valid mixed clandestine marriage either in Germany or in Hungary.

3. In reality the intention of the Holy See in granting the above mentioned derogation in favour of Germany, by the decree of 1 Feb. 1908, (though only divulged later), was « to write to the Bishops of Germany and request them to consider well the grave inconveniences resulting from mixed marriages ; and then to petition the Holy See, with a view to obtaining at an opportune time the abrogation of the Constitution *Provida* ». In like manner, in the decree extending the privilege to Hungary, the concession is said to be granted *for the present*, and the Hungarian Bishops are warned that it is their duty fittingly to dispose

Conclusion. Apart from the exception granted in the case of the *Conclusion.* Empire of Germany and the Kingdom of Hungary, *all marriages contracted between persons of whom one at least is a Latin Catholic, and such marriages only, are subject to the new law of clandestinity.*

Note. The extent of the law of clandestinity under the Tridentine legislation is given at length in the *Coll. Brug.*, t. XII, p. 462 s. and pp. 568-580. We will content ourselves with recapitulating here the principal innovations introduced in this matter by the new legislation :

a) Henceforth there are no longer *countries that are not subject to the law.* Formerly there were several, in which the chapter *Tametsi* had not been promulgated, such as England, Denmark and Norway. These countries, in which clandestine marriages were formerly valid, even between Catholics, are for the future, subject to the same formalities as the rest, both for the validity of the contract and for its licitness.

b) The *persons exempt*, i. e., non-catholics and Oriental Catholics, are exempt everywhere, and not in certain countries only. In Belgium, where heretofore, clandestine marriages between persons baptized in heresy were invalid, they are now valid, when both the man and the woman are baptized heretics.

c) Heretofore, as we have said, except in the island of Malta, *the principle of communication of exemption* was in force, so that the exemption of one of the contracting parties sufficed to withdraw the other from the law of clandestinity. Thus marriages between Catholic and infidel, or between Catholic and non-catholic, were of themselves valid, as often as the law of the Council, as being personal and local, exempted the non-catholic party. On the other hand, under the new discipline, this principle is abrogated, and henceforth the party subject to the law communicates his obligation to the other, so that, except in Germany and Hungary, marriages of this kind are subject to the law of clandestinity.

With regard to the law of the Council of Trent as being *local* and *personal*, the principles that determine its import are clearly set forth and practically applied in the *Causa S. Christophori de Habana*, decided by the S. Rota, 15 July 1910. Consult *Acta Ap. Sedis*, 1910, t. II, p. 874 ss. (1).

the faithful to receive, later with filial obedience and docility, the decisions that the Apostolic See may hereafter consider opportune for the purpose of introducing unity in matrimonial legislation ». *Canon. Contemp.*, 1909, p. 581 s.

1. In this same *Causa* was also discussed the impossibility of observing the law of the Council of Trent. The S. Tribunal examined the question to ascertain what kind of impossibility sufficed to constitute a ground of excuse, and to what extent.

80.

Conclusion.

81.

The extent of the Tridentine law was quite different.

82.
Sanctions
against trans-
gressors.

Scholion I. Sanctions.

Article X of the Decree *Ne Temere* provides by way of sanction,
1° that *parish priests* who violate the prescriptions of the decree as set forth above, shall be punished by their Ordinary in proportion to their fault; i. e. more severely for the transgression of a condition affecting validity, than for one that affects merely the licitness of the marriage.

2° Moreover, if they have assisted at a marriage contrary to the prescriptions of § 2 and 3, art. V, that is to say, if, without the permission of the particular parish priest, and otherwise than in a case of grave necessity, they have joined in marriage those who were not their own parishioners, who, in other words, had neither a domicile nor a month's residence in their parish, they must *give up* to the particular parish priest of the contracting parties (1) the *stole fees* received on that occasion, viz. the fees due to the parish priest by right of stole, but not the offering received as a stipend for the celebration of mass (2).

Under the Tridentine discipline it was ordained a/ « that the parish priest or any other priest who should assist at a marriage without the required number of witnesses, and the witnesses who should assist thereat without the parish priest or other priest, as well as the contracting parties themselves, should be severely *punished*, at the will of the Ordinary ».

b) That « if a parish priest, or any other priest, whether regular or secular, even when claiming privilege or immemorial custom, should dare to effect the union or bless the marriage of parties belonging to another parish, without the permission of their particular parish priest, he should be *ipso facto suspended*, and should so remain till such time as he should be absolved by the Ordinary of the parish priest to whom it appertained to assist at the marriage and bless it » (3).

1. In the case in which the parties have a domicile on the one side and a month's residence on the other, and consequently two particular parish priests, the decree does not determine to which of the two pastors restitution is to be made. The determining of this would be a suitable matter for the diocesan decrees; but pending a settlement of the point, it seems equitable to divide such fees equally between the two claimants. SCHAUB, o. c., p. 16 (compare with p. 14), quotes the diocesan decrees of Germany regulating this matter; it is said that restitution should be made to the parish priest of the place in which the bride has her domicile.

2. The text of art. X does not extend this provision to parish priests of *bridegrooms* who unduly assist in the place of parish priests of brides, but the Bishop could do so. He would have just grounds for dealing in like manner with those who, without being the particular parish priests of the contracting parties, and without preliminary permission, bless marriages in case of urgent necessity. The sanction of the Decree does not provide for this case.

3. See the interpretation in the *Coll. Brug.*, t. VI, p. 368 ss.

These measures are regarded as *abrogated* by the new Decree (1). This in fact professes from the beginning to introduce a new and complete law « for regulating the discipline of betrothment and marriage, and for rendering their celebration easy, certain and regular ». It is manifest that the sanction of the law of clandestinity is a part of this whole, and consequently it is now necessary to take into account only the penal provisions contained in the decree itself.

Scholion II. Civil formalities.

According to the Belgian (2) law marriage is a *solemn* contract, that is to say, a contract that must be made in the forms required by law ; certain formalities are prescribed for its very existence, others for its validity. These provisions are the following :

83.

*Provisions of
the civil law
for Belgium.*

1. According to art. 8 of the law of 26 Dec. 1891 : « Le mariage sera célébré *publiquement* devant l'officier de l'état civil (3) de la commune (4), et dans la commune où l'un des époux aura son domicile ou sa résidence à la date de la publication... et, en cas de dispense de publication, à la date de la célébration » (art. 165 du Code civil).

2. According to art. 75 : « Le jour désigné par les parties, après les délais de publications, l'officier de l'état civil, dans la maison commune, en présence de deux témoins (5), parents ou non parents... recevra de chaque

1. This is the opinion of GENNARI, o. c., p. 53 ; of DE BECKER, *Ne Temere*, p. 44 ; of VERMEERSCH, *Ne Temere*, n. 85 ; of CHOUPIN, *Ne Temere*, p. 76. HARING, o. c., p. 24, note 4, is undecided ; BOUDINHON, o. c., p. 92, was at first of a contrary opinion, but has adopted the above view in the *Canon. Cont.*, 1908, p. 354 s.

2. For the law existing in England, Germany etc., see at the end of this work.

3. The civil officer has jurisdiction only in the territory of the commune of which he is the civil officer ; outside of this territory he is not competent to proceed to the celebration of a marriage, even when he is the civil officer of both the engaged parties.

4. The civil officer assisting at the marriage must not only be the civil officer of the commune in which the marriage takes place ; he must also be the particular civil officer of one of the parties, that is to say, it is necessary that one of the parties should have a domicile or a six months' residence in the commune. Cf. PLANIOL, o. c., I, n. 852 s., who observes that in France, in virtue of the law of 21 June 1907, a month's residence is sufficient.

5. Law of 7 Jan. 1908, which reduced by one half the number of witnesses required. On the same day was adopted a law modifying the provisions of art. 37, and permitting *women* to act as witnesses for the future. This is the actual text of art. 37 : « Les témoins produits, aux actes de l'état civil devront être âgés de 21 ans au moins, parents ou autres, et ils seront choisis par les personnes intéressées. Le mari et la femme ne pourront être témoins dans le même acte ». Cf.

partie, l'une après l'autre, la déclaration qu'elles veulent se prendre pour mari et femme : il prononcera, au nom de la loi, qu'elles sont unies par le mariage ⁽¹⁾ et il en dressera acte sur-le-champ ».

There are in the legal provisions concerning the celebration of marriage three distinct elements : that which requires the presence of a civil officer ; that which demands the presence of the *competent* officer ; and that which requires the publicity of the marriage. The presence of a civil officer is required under pain of the act being held as *non-existent* ; the absence of the competent officer and the want of publicity entail the nullity of the marriage. See n° 243.

The *want of publicity* properly constitutes, before the Belgian civil law, the impediment of *clandestinity*. For the better understanding of its scope, it is important to observe *in the first place* that this publicity, in the legal sense, comprises various elements : the antenuptial publications and the circumstances of the marriage itself, such as the publicity of the place in which the contract is made (*maison communale*), the opening of the doors, the presence of the witnesses, the registration and so forth. Observe *in the second place* that a marriage is not invariably annulled on the ground of clandestinity when all the conditions of publicity have not been combined, even at the moment of its celebration. The law allows the judge a certain latitude and power to decide in each case, according to the circumstances, whether the contract has had a sufficient publicity or not. In particular the judge will annul the marriage if the want of publicity has been intentional, or, again, if the identity of the contracting parties has been concealed. In this connection a striking decision of the Court of Appeal of Ghent, of the 17 Nov. 1910 (*Pasicr.*, 1911, II, p. 10 s.) may be consulted, and compared with the decision of the tribunal of the same town on the same question, 7 July 1909 (*Pasicr.*, 1910, III, p. 64 s.). See also PLANIOL, o. c., I, n°s 1018 s. ; VAN HEMEL, o. c., p. 24 s. ⁽²⁾.

Coll. Brug., t. XIII, p. 386 ss. The same provision is in force in France since 1897, but four witnesses are still required there.

1. PLANIOL, o. c., I, n. 862, remarks that the civil officer does not take the part of a simple witness to the consent given : « c'est lui qui les (époux) déclare unis devant la loi ». Cf. BALOG, o. c., p. 77 s. ; in the same place it is noted that in the new German Code the duty of the civil officer is reduced to that of a mere qualified witness, and that his declaration has no legal effect, but is simply ceremonial. Cf. also SEHLING, in the *Neue kirchl. Zeitschr.*, 1908, p. 452.

2. For the provisions of the civil law in other legislations : see LEHR, o. c.

With regard to Belgians who marry abroad and foreigners who marry in Belgium : according to art. 170 of the civil code (Law of 20 May 1862) and the Hague Convention of 12 June 1902 (sanctioned by the Belgian law of 27 June 1904), is applied, for the *formalities* of the contract, the principle : *locus regit actum* : that is to

Scholion III. The ancient law.

1. Among the *Hebrews* to the *Schidduchin* or betrothment there succeeded the *Kidduchin* or nuptials, which were accompanied with diverse symbolical ceremonies and festivities ; sexual intercourse does not appear to have been part of the essence of the contract. See above, n° 60 ; the *Realencykl.*, t. V, p. 741-743 ; MUSCETTULA, o. c., p. 229-239. *The ancient Hebrew law.*

2. In the Roman law there were two kinds of *justae nuptiae* (¹). Marriage *cum manu* (*Manusehe*), with delivery of the bride into the hands of the *The ancient Roman law.*

say, that « sera reconnu partout (in all countries accepting the Convention) comme valable, quant à la forme, le mariage célébré selon la loi du pays où il a eu lieu ». Cf. BOUSCHOLTE, o. c., p. 10 s. Observe a/ that the marriage may be celebrated abroad before the diplomatic or consular agent of the country to which the contracting parties belong, and according to the formalities required by the law of their native country. See ORESCU, o. c., pp. 369-382 ; *Archiv. f. k. Kirchenr.*, 1906, pp. 465-485. Observe b/ that according to the new text of art. 170 of the civil code, introduced by the law of 20 May 1882, the validity of the marriage does not *certainly* depend on the antenuptial publications (the original text of art. 170 seemed to say the contrary); moreover, that for validity there is no need of publicity, such as we have just seen is required for marriages celebrated in Belgium ; for, supposing the observation of the formalities of the place in which the marriage is celebrated, there is required for validity nothing more than the observance of the provisions, under pain of nullity, inserted in the preceding chapter of the Code, among which provisions there occurs no prescription as to the publicity of marriage (art. 165 and 191). Cf. in this sense the decision of the Court of Brussels, 30 nov. 1907, in *Pasicrisie*, 1908, II, p. 44 ss. with note ; *Revue de Droit Belge*, in the Supplement to *Pasicrisie*, 1910, p. 419 ss. On the other hand there is the decision of the Court of Ghent, 17 Nov. 1910 (*Pasicrisie*, 1911, II, p. 10 ss.), insisting that the provision of art. 191, concerning the publicity of marriage, is a general provision, and that it accordingly affects marriages taking place not only in Belgium, but elsewhere also.

1. Besides the *justae nuptiae*, the Roman law recognised three kinds of inferior marriage : *matrimonium juris gentium* or *injustum*, for foreigners ; *concubinage* or marriage between a freeman and his freedwoman ; and *cohabitation* or *contubernium*, i. e. marriage between slaves, or between freemen and slaves. *Concubinage* in particular was, at least under the empire, legally recognised, and constituted a marriage of an inferior class, in which the woman had not the title of wife but of concubine, and did not share her husband's rank, almost as in morganatic marriages. Cf. DARENBERG ET SAGLIO, o. c., V° *Concubinatus*, I², p. 1436 ; VANTROYS, o. c., pp. 22-27 ; PEYTEL, o. c., p. 42 ss., and also p. 47 and 52-54, where he observes that the word *concubine* was formerly part of the ecclesiastical vocabulary, and denoted a lawful wife, but one of an inferior condition. Cf. CHARDON, o. c., p. 379 ss.

husband ; and marriage *sine manu*, in which the wife preserved her rights or remained in the power of her father (¹).

In this latter case the law specified no particular formalities for the giving of the consent(²); in the former there was a distinction between marriage by *confarreation*, by *coemption*, and by *use*. Only the first of these was subject to legal formalities, while for marriage by *coemption* (³) and by *use* (⁴) private consent was sufficient. Cf. DARENBERG ET SAGLIO, o. c., V^o *Manus*. The legal formalities of marriage by *confarreation* (reserved to the patrician families) consisted in this, that the marriage was contracted « before the pontifex maximus and the flamen dialis, in the presence of ten witnesses ; before its celebration the auspices were consulted, and a sacrifice was offered to the gods » (⁵).

These were the requirements of the Roman law. In course of time various formalities were, as a matter of fact, introduced *by custom*, and generally observed, in addition to the requirements of the law and the legal sanction, even in the case of marriages *sine manu* (⁶). Most of these were borrowed from the legal prescriptions for marriage by *confarreation*, but with the omission of the presence of the flamen and pontifex (⁷). Cf. PICHON, *Hommes et choses de l'Ancienne Rome*, Paris, 1911, p. 21 ss.

1. Cf. P. WILLEMS, *Droit Romain*, p. 60 s. ; DESFORGES, o. c., p. 27-37 ; he shows how and for what cause the primitive form of marriage (*Manusehe*) yielded to the marriage *sine manu*, which from the third century was, so to speak, the only one in force. Cf. DARENBERG ET SAGLIO, o. c., V^o *Manus*, III², p. 1586 s.

2. The *deductio uxoris in domum mariti* was not an essential formality in the celebration of marriage, but the giving of consent was, as we have shown above. See n^o 59 and the passages quoted.

3. It was so called because it comprised, among other ceremonies, a symbolical sale before the judge and five witnesses. This ceremony was not a part of the contract itself, but symbolized the transmission of authority from the hands of the father of the family to those of the husband. See above n^o 52.

4. The marriage by *use* was no other than the marriage *sine manu* passing spontaneously to the state of marriage *in manu*, in virtue of cohabitation prolonged for a year and uninterrupted by an absence of three nights.

5. Cf. GLASSON, o. c., p. 161, who adds : « Marriage thus contracted was called *confarreatio*, because in the celebration of it, the husband and wife were required to break and eat together a cake made of meal (*panis farreus*) ».

6. These ceremonies were omitted in the marriages of widows. Cf. DARENBERG ET SAGLIO, o. c., V^o *Matrimonium*, III², p. 1654 s.

7. DARENBERG ET SAGLIO, o. c., V^o *Matrimonium*, III², p. 1654 ss. GLASSON, o. c., p. 168, gives a description of it. It is interesting to note that the bride made modifications in her dress previously to the marriage. « Some time before the marriage, the bride laid aside the dress worn by girls (*toga praetexta*) and offered it together with her toys to the gods, more especially to the *lares* of her father's

3. In the ancient German law we meet with but few legal prescriptions relating to the celebration of marriage, but various solemnities were *in use* in different parts. We will confine ourselves to saying, with *Friedberg* (1), that to the betrothment succeeded the nuptials, contracted publicly in the presence of the parents and relations, followed by rejoicings and festivities, and ending with the surrender of the bride by her father or guardian into the hands of her husband.

Often also the ministrations of a *Fürsprecher* or bridesman were employed, whose business it was to regulate the wedding and everything connected with it (2).

4. For the ancient *ecclesiastical* formalities, see above, n° 63 (with note) and also below, n° 122.

Scholion IV. Proof of marriage.

1. Before the forum of the Church.

Proof of marriage may be established in any way whatever : but the ordinary method, for marriages contracted before the Church, is by the entry in the register (see below n° 338), or by the evidence of the parish priest or of the witnesses. As regards marriages celebrated validly, in the past, without the form prescribed by the Council of Trent, or at the present time, without that established by Pius X, the evidence of the parties themselves may, under certain conditions, be admitted, as is the case also for marriages celebrated in due form, the proof of which by means of the

84.
Manner of
establishing
proof of mar-
riage in the
forum of the
Church ;

house. She was clothed with a *tunica recta*, round her waist she wore a woollen girdle (*cingulum*), and on her head a red veil (*flammeum*) which took the place of the fillet worn by girls. Her hair was dressed in a special manner, held by a symbolical pin called *hasta celibaris*, and adorned with a wreath of flowers. For the *deductio in domum*, the bride was taken with a show of force from her mother's arms, and conducted to her husband's home, escorted by a great array of musicians, singers, torch-bearers and guests. On arriving there, the newly wedded wife anointed the door of her new home with oil and grease, then she crossed the threshold and was brought into the *atrium*, where her husband offered her water and fire, to show that she was to take part in his life and in his family worship ».

1. O. c., p. 24.

2. SOHM, *Das Recht*, p. 65 s., notes different symbolical usages formerly prevalent among the Germans. Thus the bridegroom, as a sign of power and authority, placed his foot on that of the bride ; from this there came later the custom of giving the shoe (*Pantoffel*). So again the tendering of the hat and mantle, *Hut und Mantel* : the hat as a token of the precedence of the husband, the mantle as a sign of the protection that he owes to his wife. See also ROCHE, o. c., p. 77 and p. 74.

witnesses it is impossible or very difficult to obtain, as for example, when the marriage took place abroad. In such cases : a/ if one of the parties denies, and the other affirms, it is for the latter to prove his statement⁽¹⁾ ; b/ if they both deny on oath, they cannot be considered as married ; c/ if both affirm on oath that they are married, their assertion must, as a rule, be accepted, unless both agree in affirming that they were secretly married, when another and a public marriage, involving one of the parties, has subsequently taken place : in that case preference must be given to the public marriage, as long as no legal evidence is produced in support of the secret marriage or against the validity of the public marriage⁽²⁾.

Possession of state may also be invoked as a proof ; just as sexual intercourse following on betrothment affords a presumption of marriage, a presumption that was formerly *juris et de jure* (admitting no proof to the contrary).

2. Before the civil forum.

in the civil
forum.

Article 194 of the Code Napoléon ordains *in general* : « Nul ne peut réclamer le titre d'époux et les effets civils du mariage, s'il ne présente un acte de célébration inscrit sur le registre de l'état civil ». This is, *as a general rule*, the only proof of marriage admitted to secure for a marriage its *civil effects*⁽³⁾.

Exceptions. 1. When there is « *possession of state* », that is to say, the position of a man and woman living as husband and wife, to the public knowledge, and reputed as married :

a/ If « l'acte de célébration du mariage devant l'officier de l'état civil est

1. Ch. 28, X, IV, 1. Ch. 1, X, IV, 3, however, seems to be in disagreement with the former ; see the explanation proposed by WERNZ, o. c., IV., n° 187, and GASPARRI, o. c., II, n° 878.

2. This mode of action, especially as concerns the hypothesis given under c/, has lately been approved by the S. C. de Sacr. in its decree *Venetiarum*, dated 6 March 1911, relating to marriages contracted in America, « the written attestation or any other legal proof of which it is impossible or very difficult to obtain without long research, at a time when circumstances do not admit of delay » ; the S. C. replies : « If the legal proof of the marriage, whether in writing, or through witnesses, is impossible, in spite of the efforts made, let the parties be required to confirm their statements on oath, and so let them be regarded as lawfully married, and their children as legitimate. Nevertheless, those cases must be excepted, in which the law requires a full proof, as for example, where another marriage is in question (such as a subsequent marriage lawfully established), or again, where it is a case of receiving orders (at the instance of one born of a union imperfectly proved) ».

3. For the proofs that the law admits relatively to other effects, see PLANIOL, o. c., I, n° 866.

représenté, les époux sont respectivement non recevables à demander la nullité de l'acte » ⁽¹⁾, because, e. g., the act was not signed by them, and the statement that they did not know how to sign their names was omitted. Art. 196.

b/ In the case of the children, when the parties whose marriage has not been established by a civil act are both deceased, « la légitimité des enfants ne peut être contestée sous le seul prétexte du défaut de représentation de l'acte de célébration, toutes les fois que cette légitimité est prouvée par une possession d'état qui n'est pas contredite par l'acte de naissance ». Art. 197.

On the other hand the « possession of state » can never be invoked by the parties themselves as a proof of their marriage. Art. 195.

2. Lorsque la preuve d'une célébration légale du mariage se trouve acquise par le résultat d'une procédure criminelle, l'inscription du jugement sur les registres de l'état civil assure au mariage, à compter du jour de sa célébration, tous les effets civils, tant à l'égard des époux qu'à l'égard des enfants issus de ce mariage ». Art. 198. See THIRY, o. c., n. 310.

3. The text of art. 194 itself excepts the case spoken of in art. 46 : « Lorsqu'il n'aura pas existé de registres, ou qu'ils seront perdus ⁽²⁾, la preuve en sera reçue tant par titre que par témoins » ⁽³⁾.

ARTICLE 3. Conditional consent.

I. Meaning.

1° Conditional consent is consent given under a *voiding* or *suspensive* condition.

The fulfilment of a voiding condition puts an end to the obligation contracted ; thus I may make a contract with some one, but under the condition that, if my father dies, I cancel the contract ; in this case the contract is there, but on the fulfilment of the condition, the obligation assumed under it ceases to exist. On the

85.
Meaning of
consent that
is voiding,

1. The « possession of state » can therefore supply, to a certain extent, for the irregularity of the *document* attesting the marriage, but not for the defects that vitiate the celebration of the marriage. THIRY, o. c., n° 300.

2. It scarcely ever happens nowadays that the registers are lost, as a duplicate of them is kept at the office of the Tribunal of First Instance.

3. In such a case a marriage might be proved, among other ways, by papers left by the deceased father and mother ; registers kept by parish priests might, in like manner, be admitted by the judge as proof of marriage.

that is suspensive.

other hand, the fulfilment of a *suspensive* condition causes the obligation to be contracted. This latter condition is the only one that renders the contract *truly conditional*.

Now a consent of this kind (we shall not speak here of the voiding condition) ⁽¹⁾ supposes :

a/ that the condition has been *imposed actually*, and not merely interpretatively. Thus there is no conditional consent, if one contracts marriage in such dispositions as, if he had known such or such a thing, of which he was ignorant at the time, he would not have bound himself. In other words, one has to consider not what he would have done, but what in reality he did : there is no need to take into consideration that condition what he would have imposed, if he had thought of it ⁽²⁾.

b/ That the condition concerns *a future and contingent event*. Conditions that regard either something that is already past, or something future, but already certain, do not suspend the consent, but a contract made under such a condition, is straight-way valid or invalid, according to the fulfilment or certain non-fulfilment of the condition, at the moment when the consent is given. Nevertheless if, in certain cases, the fact of the fulfilment is not known, the validity of the consent is doubtful.

c/ That the condition *be an integral part of the contract itself*, in such manner that the consent is attached thereto and held in suspense, and the condition is, as they say, part of the bargain.

It is, in fact, necessary to distinguish conditional consent from *modal* consent, which adds to the contract only an accessory and supervenient clause, that is not an integral part of the

1. The indissolubility of marriage is incompatible with a voiding condition, with the exception of marriage *ratum non consummatum*, which is dissolved by solemn vows and papal dispensation. This is the only exception admitted in the case of Christian marriage.

2. Such might be the case of *an antecedent error*, e. g., as to the quality of the person married ; if the other party had known that it was wanting, he would not have contracted the marriage. Here there is no conditional consent, and *on this head* the marriage is certainly not invalid. Nevertheless, it may sometimes be so for another reason, e. g., if the error concerns a quality that is essential in the eyes of the other party. We will explain our meaning later, when speaking of the impediment of error, n° 260.

agreement, and so cannot suspend or limit the consent (1).

2. There are *several kinds of conditions*. Some of which are repugnant and others not repugnant to the substance of the matrimonial contract ; some immoral, leading to sin, and others honest ; some possible, and others impossible. Such are the principal categories.

II. Principles.

A. Marriage contracted under a suspensive condition that **is repugnant to the substance of the matrimonial contract** is altogether invalid by the law of nature itself.

This is evident, since such a consent involves a contradiction ; one cannot pull down with the one hand what one builds up with the other, nor consent and refuse in the same breath (2).

B. As regards matrimonial consent given under a suspensive condition that **is not repugnant to the substance of marriage** :

1. *If the condition is possible and honest.*

a/ The marriage, in either forum, remains in suspense until the fulfilment of the condition ; before that, it has no real existence(3), and the consent may still be validly withdrawn ; nevertheless, such withdrawal of consent would be illicit, since there is an obligation to wait for the fulfilment of the condition.

b/ If the condition fails to be realized, the marriage contract fails too (4).

1. Neither must we confound the conditional contract with the *unnamed* contract « *facio ut facias* ». In the former there is no obligation to fulfil the condition, but only to execute the contract, if the condition is fulfilled ; in the latter, on the other hand, there is a double obligation. Thus, if John says to Mary : « I will marry you, if you give me £ 40 », this contract, if conditional, carries with it for John the obligation to marry if the money is paid to him, but it puts no obligation on Mary to give him the money ; on the other hand, if it is the contract « *facio ut facias* » that has been made in these terms, then John is obliged to marry, when once the money has been paid, and Mary on her part is obliged to hand over the £ 40, provided the marriage follows.

2. This is confirmed by ch. 7, X, IV, 5 : « If there should be inserted in the contract conditions contrary to the essence of marriage, e. g., if the one should say to the other : 'I contract marriage with you on condition that you avoid having children'..., the matrimonial contract, however favourable it may be, is without effect ».

3. C. 5, X, IV, 5.

4. See the *causa Cameracen.*, decided by the Tribunal of the Rota. The diocesan

86.

Principles :
1° If the suspensive condition is repugnant to the substance of marriage, it renders it invalid.

87.

2° Effect of a suspensive condition not repugnant to the substance of marriage :
a) possible and honest ;

c/ On the other hand, once the *condition is fulfilled*, the contract spontaneously becomes valid, and, apart from any legal provision to the contrary, there is no need to renew the consent. That the consent need not, *of itself, be renewed*, results from the very nature of the conditional contract ; and the documents quoted by SANTI, o. c., n° 11 et seqq., and by GASPARRI, o. c., n° 849 seq., according to Fagnanus, also show it. This holds good not only in marriages exempt from the formalities prescribed by the Council of Trent or by Pius X, but also in those that are *subject* to them ; even in this hypothesis, provided, of course, that the formalities have been observed, the marriage becomes valid as soon as the condition is fulfilled, whether it was made known to the parish priest and the witnesses or not. There is no need to renew the consent in the prescribed form, or to notify the parish priest and the witnesses of the fulfilment of the condition ; it is sufficient, where the placing of the condition was public, that the fulfilment of it should be so likewise, so that the validity of the marriage may be duly proved.

The reason for this is that the marriage *is contracted* at the moment when the conditional consent is given in the presence of the parish priest and the witnesses, and not when *the condition is fulfilled*. This is why, although conditional marriage is truly valid and produces its effects only at the moment of fulfilment, nevertheless, by a legal fiction, it is looked upon as contracted from the time consent is given.

What holds good for the fulfilment of the condition and its efficacy with respect to conditional marriage, holds good also for any act that implies the formal or tacit intention of the parties to render the former consent absolute ; and in like manner there is no necessity for the said intention to be expressed in the form of the Decree *Ne Temere*, but it is enough, according to what we have said above, that, for the legitimate proof of the marriage, there should be public knowledge of the intention (1).

tribunal of Cambrai had declared null a conditional marriage, in which the condition concerned the absence of bodily odour. Originally, on the first hearing, the S. Rota declared that the nullity was not established ; but on a second and on a third hearing, respectively on August the 11th 1910 and on June the 23rd 1911, it confirmed the decision of the tribunal of Cambrai. See *Acta Ap. S.*, II, p. 961 s., and III, p. 497 ss.

1. This intention is *presumed* in law whenever the conditional contract is

We have said : *apart from any legal provision to the contrary*. A provision of this kind really exists in the matter of those who, being bound by a diriment impediment, contract marriage under the condition : *if the Pope grant a dispensation* ; it is necessary for them, after having obtained a dispensation, to renew their consent. This provision ought not to be extended in the sense that some give to it, as if marriage, contracted under the said condition, were altogether null in law and reputed as non-existent (cf. n° 21). Its import is this : the dispensation, if given, will not generally be granted except with the clause usual in the case of a dispensation *in matrimonio contracto*, viz., that consent must be renewed after the removal of the impediment. See below, n°s 408 and 410.

Note. Parish priests are forbidden, except for grave reasons and with the permission of the Ordinary, to permit parties to contract marriage under a condition. If a legitimate case occurs, it is the rule that the condition should be declared at the time of the celebration of the marriage, or that it should be made public before the wedding. On the fulfilment of the condition, or in case of renunciation, the fact must be duly notified, so that there may be proof of it in the *forum externum*.

2. *If the condition is immoral or impossible.*

a/ *In the forum internum*, an impossible condition seriously imposed, renders the marriage null ; and he who knowingly acts thus, gives his consent only in jest. b) *immoral or impossible.*

followed by the conjugal act, so that the marriage by that very fact becomes valid. This necessary (*juris et de jure*) presumption, established by chapters 3, 5 and 6, X, IV, 5, according to the more probable opinion, was not abolished by the Tridentine discipline, nor by the decree *Ne Temere*, and consequently it is necessary to admit that this kind of presumed marriage still exists. Leo XIII does not seem to have touched it at all in his Constitution *Consensus mutuus*, of 1892, since he speaks in express terms only of the sole case of the sexual act following upon *betrothment*. See above, n° 14, and below, n° 92 ; WERNZ, o. c., n° 298, and compare with n° 29, note 12. HUSSAREK, o. c., p. 248 ss., proposes another explanation : in his opinion, the copula is not equivalent before the law to the renouncement of the condition, in such a way as to make absolute the previous conditional consent ; it constitutes, by virtue of the presumption established by the law, the marriage-contract itself ; but then one cannot understand how such a contract is valid without the formalities of the Decree *Ne Temere*.

For an *immoral* condition seriously imposed the same principles are applicable as in the case of an honest condition, but with this exception, that there is no obligation to wait for the fulfilment of the condition.

b/ In the *forum externum*, an impossible or immoral condition is presumed not to have been imposed seriously, and consequently the contract is considered as absolute ; for c. 7, X, IV, 5, declares : « conditiones appositae in matrimonio, si turpes aut impossibiles fuerint, debent propter ejus favorem pro non adjectis haberi » (1).

Nevertheless, this presumption is not *juris et de jure*, and consequently it admits of proof to the contrary ; so that if it is established that the condition was serious, it must be judged in the *forum externum* in the same way as in the *forum internum*.

III. Application.

88.
Application.

The principles which we have just enunciated have to be applied with considerable frequency for cases of a *condition repugnant to the substance of marriage*.

What has to
be considered
in practically
solving each
case.

For the solution of these cases, one ought to take into account the following observations :

1. It is necessary to examine if the condition is *really repugnant to the substance of marriage* ; that is to say, if it is inconsistent with the rights and duties that essentially belong to the conjugal union, viz., as we shall see later, those which concern sexual intercourse and the education of the children ; or if it is destructive of any one of the essential properties of the matrimonial union, of its sacramental character, of its indissolubility, or of its unity.

2. It is necessary to see if the imposed condition is *really suspensive*, according to what we have said above in 1°, that is to say :

a/ if it has been imposed *in reality*, or only *interpretatively*, as for

1. This presumption probably does not affect an impossible or immoral condition concerning the past or the present, but only the *future* ; and this is the only one that we have in view here. See the solution of the case given in the *Anal. eccles.*, 1901, p. 64 ss. ; WERNZ, O. C., IV, n° 300, note 31 and n° 302, note 39.

example, by one who, while contracting marriage in the usual way and without any restriction, was ignorant that he thereby contracted an absolutely indissoluble union, and would not have married if he had known that it was so ; the fact that he would have imposed a condition of dissolubility, if he had thought of it, is obviously insufficient.

b/ If the condition is *an integral part of the contract*, or if it is merely *an accessory modification* of it. We have already observed that it is above all necessary to keep this distinction in view. The intention and purpose of the contracting parties must decide the question here ; it is all a matter of whether or not the parties were firmly resolved that the condition should be a « *conditio sine qua non* » of the marriage ; whether or not it was their absolute and predominant determination to marry subject to this condition, and to break off the match rather than marry without it.

These considerations enable us to solve without difficulty the different cases that may occur ; and in particular :

A. The case in which one contracts marriage **under condition of dissolving the union in case of adultery** on either side, as is the practice among Protestants and Greeks ⁽¹⁾. If the condition is really suspensive, the marriage is null, because it is vitiated in its essence ⁽²⁾ ; on the other hand, if the condition is not part of the agreement, but is simply accessory to it, or if it is only added interpretatively, the marriage is valid ⁽³⁾.

89.
Examples.

*Marriage
contracted
under condi-
tion of disso-
lution in case
of adulterys ;*

1. An analogous case frequently occurs among pagans, who often marry with the intention of divorcing the wife after a time. On this subject see the solution of the case laid before the C. S. O. in 1908, and given in the *Coll. Brug.*, t. XIV, p. 241 ss.

2. To the question : « An sit validum matrimonium contractum inter catholicam et schismaticum haereticum, cum conditione foedandi vel solvendi matrimonium », the C. S. O., 2 Oct. 1860, replied : « Si ista sint deducta in pactum... sunt nulla ; sin aliter, sunt valida ». *Collectanea*, n° 1301, under n° 8.

3. Cf. the documents quoted in the *N. R. Th.*, t. XXI, pp. 594-599, t. XXX, pp. 611-634 ; as well as the decision given in the *Canon. Contemp.*, 1896, p. 492. Read also the *Instructio* of the C. S. O., of 9 Dec. 1874, n° 8, (in the *Collectanea*, n° 1301) : « Missionarii in ea esse videntur sententia, barbarorum conjunctiones, etiamsi speciem quandam gererent justi matrimonii, omnes tamen esse irritas ob errorem de conjugii dissolubilitate... seu... esse vitiatas intentione contraria substantiae matrimonii. Verum A. T. optime novit hunc errorem, menti inhaerentem et *non deductum in pactum*, matrimonio non officere ». Cf. also the

Observe that in the case given, there is no question of a *voiding* condition, as one might think at first glance, as if the parties gave a simple consent to the marriage, but with the intention of dissolving the union in case of adultery (¹). As a matter of fact they do not give a simple consent, but their consent has reference to a marriage that is dissoluble in case of adultery, to the exclusion of an indissoluble marriage. This is why the contract is vitiated in its essence.

or of practising onanism in marriage ;

B. The case in which one consents to marriage **on condition of practising onanism**, whether from the beginning (²), or after the birth of one or two children (³). Again, if it is really a question of a suspensive condition, and not, as is usually the case, of a mere modification of the contract, the marriage is invalid, since such a condition is incompatible with the substance of marriage, inseparable, as it is, from the right and obligation to generative relations.

or of not making use of marriage.

c/ The case in which one contracts marriage **on condition of not making use of it** (⁴). Here again the same solution applies ; the marriage will be null or valid, according as the clause in question is a true condition, and an integral part of the nuptial contract, or is merely an accessory modification of it.

The transfer of the proprietary right over the bodies of the respective parties is, in fact, of the essence of marriage, no less than that of the *right* of making use of one another for the purpose of generation. The essential object of the matrimonial contract is no other than the transfer of this *right* with a view

Instructio of this same Congregation, of 1877 (*Collect.*, n° 1302, towards the end). See also the case decided by the S. Rota, 24 July 1909, where it is declared that in the case proposed, the nullity of the marriage is not established ; it is there remarked, as a subsidiary argument, that the husband had made no mention of the restriction placed on the contract, and that this silence towards the woman gives ground for presuming the absence of the restriction. *Coll. Brug.*, t. XIV, p. 619 s. Cf. also *Causa Eboracen.*, 9 Dec. 1911 (A. A. S., IV, p. 153 ss.).

1. A voiding condition of this kind would be considered as not imposed, since a marriage, duly contracted with full consent, is incapable of dissolution.

2. Marriages contracted under the condition of having no children, are known in France as *mariages blancs*.

3. See the case solved by the S. C. C., in the *Anal. eccles.*, 1904, p. 294. s.

4. Cf. *Coll. Brug.*, t. XII, p. 104 s. ; and the case solved in the *Anal. eccles.*, 1904, p. 294 s.

to generation. Now, if the condition of not using the marriage is an integral part of the contract, the consent is restricted in its object to the limits of the imposed condition ; and is only given to the exclusion of the *power* and *right* to use one another. It is, therefore, clear that such a condition substantially vitiates the consent.

On the other hand, in the second hypothesis, that is to say, where the added clause is merely accessory to the contract, matrimonial consent is considered as given simply and without any restriction *that affects the bond itself*, and consequently the right to the use of one another's bodies is given mutually, irrevocably and entirely ; and that right remains entire, notwithstanding *the accessory and separate agreement* not to make use of it. That agreement does not take away the *right* to sexual intercourse, a right irrevocably acquired by the matrimonial consent, but it excludes only the *use* or exercise of it, which does not belong to the essence of marriage (*).

Note. 1. When the ecclesiastical courts have to take cognizance of cases of this kind, in which the annulling of a marriage, contracted under a condition of not making use of it, is sought, they often abstain from pronouncing its nullity, on account of the difficulty there is in ascertaining, if, in the intention of the contracting parties, the condition was really suspensive (2).

90.
Observation.

Ordinarily, when it can be decisively proved that the marriage has not been consummated, they rather advise an application to the Pope for a dispensation from a marriage *ratum non consummatum*. See the cases relative to this question in the *Revue des sciences ecclésiastiques*, 1905, t. 91, p. 31 et seq. ; see also the cases reported in the *Canon. contemp.*, and in the *Anal. eccles.*, and those of earlier date in the *Canon. contemp.*, 1901, p. 587 s. and 1903, p. 297.

2. The preceding shows that it is quite possible to contract marriage *notwithstanding a vow of chastity, mutually accepted and approved*. There is, indeed, no reason why, on the one hand, matrimonial consent should not be given reciprocally together with the mutual *right of property*, full and

1. See below, n° 132, the distinction between the right to the conjugal act and the exercise of that right, i. e., between the radical right, as it is called, and the right that can be actually demanded, the difference between the mutual property of one in the body of the other, and the enjoyment of that property.

2. Observe nevertheless *Causa Cameracen.*, for which see n. 87.

unrestricted, over the body ; and on the other hand, why the parties should not, by a separate act, agree and bind themselves by vow not to make use of the right thus acquired, and to observe chastity (¹).

Hence those married under these conditions do not sin against *chastity* by the conjugal act, but against *religion* only, in consequence of their vow : while unlawful intercourse with others on the part of the same is adultery.

Scholion. DIFFERENT KINDS OF MARRIAGE.

A. Marriage *ratum* (ratified), *legitimate*, *consummated*.

91.
Marriage
ratum,

1. Marriage is said to be *ratum* (*ratified*), when contracted validly between two baptized persons ; or when, having been contracted between unbaptized persons, it subsequently becomes a sacrament through the conversion and baptism of the two parties ; or when contracted, by dispensation, between a baptized and an unbaptized party (see n° 107). From all these kinds of marriage there results a permanent union, which only demands the consummation of the marriage to render it absolutely indissoluble (see n° 197 ss.).

legitimate,

2. Marriage is called *legitimate*, when it has been validly contracted between unbaptized persons, and has not as yet become a sacrament by the baptism of both parties (²).

1. The explanation given by P. REIT, *Die Josephsche in ihren Original und ihren Nachahmung*, in the *Zeitschr. f. k. Theol.*, 1909, p. 590 ss., is somewhat different. Marriages of this kind, contracted between parties bound on either side by a vow of chastity, are generally known as *Josephsche*, i. e., marriages in imitation of that of St. Joseph with the Blessed Virgin. This recalls the controversy, lately renewed, as to the marriage of St. Henry with St. Cunegundes. Was this marriage a *Josephsche* or an ordinary marriage, in which the holy Emperor lived with his wife as with a sister, on account of her impotency ? This latter opinion is vigorously maintained by SÄGMÜLLER, *Theol. Quartalschr.*, 1905, p. 78 ss., and also in the same review, 1907, p. 563 ss., and 1911, p. 90-126 ; see also the *Theol. Prakt. Quartalschr.*, 1905, p. 325 ss., where the traditional opinion is defended ; KOCH, o. c., who holds that St. Cunegundes was not impotent but barren, (*Arch. f. k. Kirchenr.*, 1909, p. 772 ss.).

2. This is the existing distinction between *legitimate* and *ratified* marriage. The distinction made by Gratian was different. In the *Dictum* on C. XXVIII, qu. 1, he calls marriage *legitimate*, « when contracted according to the legal institutions or customs of the country », whether between baptized or unbaptized persons ; in the former case the marriage was *legitimate* and *ratified* (*ratum*) ; in

3. Marriage is *consummated* or *not consummated*, according as the *consummated*, union, validly contracted, has or has not been followed ⁽¹⁾ by the *conjugal act, suitable of itself for the purpose of generation* ⁽²⁾.

If the *ratified* marriage is followed by the *copula*, it is said to be *ratum et consummatum* ; if the *legitimate* marriage is followed by it, it is called *legitimum consummatum* ; if the conjugal act follows a legitimate marriage, and both the parties are subsequently baptized, the marriage is then called *consummatum et ratum*.

B. **Presumed marriage, union having the form or appearance of marriage, putative marriage.** 92.
presumed,

1. *Presumed* marriage is that which is established by a presumption *juris et de jure* ⁽³⁾, based on some determinate fact as implying matrimonial consent ⁽⁴⁾.

the latter *legitimate* and *unratified* (*non ratum*). If Christians married « without observing the requisite institutions and solemnities... their marriage was considered not legitimate, but only ratified (*ratum*) ».

1. Sexual intercourse *before* marriage does not count, but only after, or at the moment that the marriage takes place.

2. The conjugal act, if onanistic or incomplete, no matter in what way, does not consummate the marriage. See on this subject SANCHEZ, o. c., t. II, disp. XXI ; and GASPARRI, o. c., nos 1064 ss. Observe that these authors declare the marriage to be consummated even when the *semen* has entered the *vagina* without penetration by the man, as for example, by means of artificial fecundation, or by diabolical agency. On the other hand any *copula* fitted for generation is considered to consummate the marriage, whether voluntary or involuntary, conscious or unconscious. Cf. HUSSERAK, o. c., p. 250 ss.

3. SANTI, o. c., l. IV, tit. I, n° 77, and GASPARRI, o. c., n° 237, in opposition to WERNZ, o. c., IV, n° 29, note 12, hold that marriage is presumed only in case of presumption *juris et de jure*, i. e., that does not admit of direct proof to the contrary, unless it happen to be evident.

4. *Formerly* there were reckoned three kinds of presumed marriage : a/ the case of the *copula* following on betrothment ; b/ the case of the *copula* following on a conditional marriage, inasmuch as sexual intercourse then implied renunciation of the condition ; c/ cases in which those below the age of puberty, after having contracted a marriage that was invalid on account of their age, ratified their contract by the conjugal act on reaching the required age.

In the sequel, when the law on clandestinity had come into force, presumed marriages were abrogated *for all cases subject to that law*, except, according to the most probable opinion, for that in which the *copula* followed a marriage celebrated under condition, in the form of the Council of Trent ; for, according to what we have said above in n° 37, the conditional consent spontaneously

having the
appearance of
marriage,

2. A union having *the appearance of marriage* ⁽¹⁾ is one that has been contracted in an invalid manner, but according to the formalities (though perchance with some essential defect), prescribed by the Council of Trent or by Pius X, where they are in force; so also, it would seem, is a marriage contracted without these formalities, but in such a way that the omission is not known, and the pseudo-married parties are publicly reputed as lawfully wedded, « en possession d'état », as the civil law says (see n° 84). Marriages exempt from the law of clandestinity are considered to have the appearance of marriage from the time that consent, valid in the natural law, and at the same time external, was given ⁽²⁾.

Note that the Church explicitly denies the appearance and form of marriage to a *civil* union, when contracted by persons subject to the law of clandestinity ⁽³⁾. On the other hand, in the case of

becomes valid from the time that the condition is fulfilled or renounced, without there being any need to renew it in the form prescribed by the Council. *For marriages exempt from the law of clandestinity*, as we have said above, n° 14, the presumption *juris et de jure* based upon the *copula* following on betrothment has been abolished by the Constitution *Consensus*, of Leo XIII, in 1892; but the two other presumptions have not suffered the like fate. WERNZ rightly demonstrates this against those who hold the contrary opinion, o. c., IV, p. 29, note 12, and compare with the decree of the C. S. O., 28 June 1865; see also below, n° 274.

1. These marriages enjoy several legal privileges: they more easily obtain a *sanatio in radice*, and the legal principle, that, when there is doubt as to the validity of the act, it is to be held as valid, is applicable to them.

2. According to WERNZ, o. c., n° 29, note 11, « Marriages contracted invalidly by an infidel or a heretic with a baptized person, whether a Catholic or not, even in countries where heretics are bound to observe the formalities prescribed by the Council of Trent, or by Pius X, must not be reckoned as cases of concubinage, but among those unions which have the appearance of marriage, as often as the formalities of marriage have been complied with in accordance with the rites of the heretical or pagan country in question, and when these marriages are there reputed legitimate ». Cf. *Collectanea*, n. 1301, p. 451.

3. Cf. the decr. of the C. S. O., 21 Aug. 1861, and the Instr. of the S. Penit., 15 Jan. 1866; GASPARRI, o. c., I, n° 480 and 698, and compare with n° 240. See also what we say below n° 305, 311 and 408, where we treat of affinity, public decency and *sanatio in radice*; in the last named passage we remark that nowadays the marriage, when contracted between persons subject to the law of clandestinity, is sometimes, though not without difficulty, put right by a *sanatio in radice*; it is supposed that the parties gave a real matrimonial consent. See below, n° 233.

contracting parties, even if Christians, who are not subject to that law, civil marriage may generally pass as a union that has the appearance of marriage ; and in particular it ordinarily gives ground for a presumption of a contract valid in conscience, as we shall show later, in n° 233.

3. A *putative* marriage is one that is contracted invalidly, but in *good faith, at least by one of the parties* ^{(1).} *putative,*

C. **Clandestine marriage, marriage of conscience, morganatic marriage.**

1. *Clandestine.*

a/ According to its etymology the word signifies in the first place a marriage contracted *in secret and without witnesses*, so that there is no legal proof of it ^{(2).} *93. clandestine,*

b/ In the second place it denotes also a marriage contracted without the *usual solemnities* ⁽³⁾. Such are those that are not celebrated before the church, and with the blessing of the priest ⁽⁴⁾.

c/ In the third place, it comprises marriages celebrated without the banns or *preliminary proclamations*, required by the Council of Lateran ⁽⁵⁾.

d/ Lastly it embraces unions effected without the formalities

1. See below n° 163, where we speak of the legitimacy of children conceived in a putative marriage.

2. Cf. ESMEIN, o. c., I, p. 182, where, in note 1, he gives the text of the *Summa* of Godfredus : « There are two kinds of marriages called clandestine : those of the first kind are such as are contracted in secret and without witnesses so that no legitimate proof of them appears ».

3. *Ibidem* : « Those of the second kind are such as are contracted without the solemnities ». See also l. c., p. 179, in note 2 on the *Summa Hostiensis* : « Marriages (are called) clandestine... in the first place on account of the omission of certain solemnities required for their lawfulness, to wit, the blessing before the church ». See also SCHULTE, o. c., p. 41 s.

4. « Au moyen âge la coutume était généralement que les époux vissent devant la porte de l'église : là ils étaient interrogés par le prêtre, qui leur demandait s'ils consentaient à se prendre pour mari et femme : puis ils recevaient la bénédiction ». ESMEIN, o. c., I, p. 179. In note 3, he gives the text of Panormitanus : « Note that the bridegroom and the bride before the consummation of the marriage, are blessed *ante valvas*, i. e., before the doors of the church. In some places, however, they are blessed before the altar with a cloth spread over them ». See below n° 122, and above, n° 63, note.

5. C. 3, X, IV, 3.

prescribed by the Council of Trent or by the decree *Ne Temere*, that is to say, without the presence of the parish priest and at least two witnesses (!).

This last is the *strict acceptation* of the word, which, apart from any indication to the contrary, is always to be understood where clandestine marriage is spoken of.

94.
marriage
of
conscience,

2. *Marriage of conscience.*

This is a marriage that is contracted in the form required by the Council of Trent or by Pius X, but in such a manner that, as far as possible, *it remains secret and unknown to the public*. In it the antenuptial proclamations are omitted, and the consent is given in the presence of the parish priest or his delegate and of two friendly witnesses, all of whom previously engage themselves to observe secrecy ; the marriage is entered in a secret register kept at the diocesan chancery.

Such marriages, though not clandestine, certainly ought not to be permitted without very grave reason, since from their nature they are liable to have evil consequences, as Benedict XIV remarks in his Constitution of 17 Nov. 1741, *Satis Vobis* (²), par. 1-5.

Nevertheless the Church tolerates them in circumstances that are altogether exceptional : in the case of an officer whom the law will not permit to marry owing to a question of dowry ; in the case of engaged parties, who, in consequence of the civil marriage of one of them, cannot be married before the law ; and in the case of a royal personage, who, being widowed, wishes to marry again for reasons of conscience, but at the same time has most urgent reasons for keeping his new marriage secret (³).

1. In the XVI and XVII centuries, in France, a marriage contracted without parental consent was sometimes called clandestine. See DESFORGES, o. c., p. 144 ; PLANIOL, o. c., I, p. 746. This is the explanation of the fact, that the Council of Trent, Sess. XXIV, c. I, *De Ref. Matr.*, treats at the same time of clandestinity and parental consent.

2. The text may be found in GASPARRI, o. c., II, p. 532 ss. See also GENNARI-BOUDINHON, o. c., 2nd P., consult. 6.

3. There is likewise ground for a marriage of conscience, as Benedict XIV remarks l. c., « in the case of those who are publicly living as husband and wife, and whom everybody believes to be married, while, as a matter of fact, they are living in secret concubinage ». Nevertheless, as in this case they are publicly looked upon as married, this is not, *strictly speaking*, a marriage of conscience ;

It is to be understood that the Church in permitting these unions reserves to itself the right of making them public, even against the will of the parties, if the good of the children or the fear of a scandal demands it.

Moreover, the Church prescribes in these various cases the prudential measures that are to be carefully observed ; these are enumerated by Benedict XIV in the constitution referred to above, par. 7 ss. ; the two principal are :

a/ The parish priest must transmit to the Bishop a written document, giving the place and date of the marriage, and the witnesses who assisted at it, in order that these particulars may be transcribed and preserved indefinitely in the register kept for this purpose. This register is entirely distinct from that in which marriages publicly contracted are ordinarily entered ⁽¹⁾. b/ It is necessary to declare the birth of the children and to notify the same to the Bishop ⁽²⁾.

their situation is less delicate, and the measures of precaution to be taken are less severe than in the examples given in the text.

A case of marriage of conscience, strictly so called, is given in the Review *Il Monitore Eccles.*, 1910, p. 137 s. A dying man confessed to the priest that he had been living in concubinage, without being reputed as married, and without any union on his part that might pass as having an appearance of marriage. On the one hand his salvation required that he should rectify his position by a real and valid marriage ; on the other hand the secrecy of confession placed an obstacle in the way of the publicity of the union. It was accordingly necessary to have recourse to a marriage of conscience, and to obtain from the penitent permission to communicate the fact to the Bishop, in order that the marriage might be entered in the secret register.

1. « This register for secret marriages must be properly made, fastened and sealed, and it must be carefully kept in your episcopal chancery ; you will not permit it to be unsealed and opened except when there is occasion to enter other marriages of the same kind, or when the exigencies of the administration of the diocese require it, or, again, when those who have a real interest demand a particular or a proof which they cannot obtain elsewhere ; you must take great care to have it fastened and sealed again afterwards. The written attestations of marriages celebrated in secret, which parish priests or their delegate have to send to you, must be transcribed word for word in the register, and the person to whom you entrust this task, must be of an irreproachable reputation and of an integrity that is universally recognised ». L.c., par. II.

2. « We will and expressly ordain » continues Benedict XIV, speaking to the Bishops, « that after the baptism, the father of the child, or, if he be dead, the mother, shall inform you of the birth, either verbally, or by an autograph letter, or by the agency of some person worthy of credit, appointed by them, in order that you may be quite certain of the fact, as well as of the date and place of baptism, and that you may know that the child baptized under the names of its

Note. The Civil Code of Spain contains its own special provisions with regard to marriages of conscience ⁽¹⁾.

95.
morganatic.

3. *Morganatic* marriage.

Marriage is called *morganatic* when contracted between a man of princely or royal birth ⁽²⁾ and a woman of inferior rank ⁽³⁾, in such a way that while this union enjoys its full rights in the eyes or the Church, from the civil point of view the wife does not share the rank of her husband, and the children are deprived of the paternal titles and offices, and are debarred from the right to the full and entire inheritance of their father and of their paternal ancestors ⁽⁴⁾.

It follows from this definition that the existence of a *morganatic* marriage

parents or under fictitious names, is legitimate, although the issue of an occult marriage. As soon as you are furnished with these particulars, and for fear of forgetting them, you will cause them to be faithfully entered in a register by him whom you shall have appointed to register occult marriages. The register containing the names of the baptized and of their fathers and mothers, though it ought to be distinct from the register of marriages, must nevertheless be kept with the same care, secured with the same seals, and locked up with the same precautions in the episcopal chancery as the register of marriages, in the case of which we have enumerated above the precautions that are to be taken ». L. c., par, II.

1. « Le mariage secret de conscience, célébré devant l'Eglise, n'est soumis à aucune formalité d'ordre civil, mais ne produit plus aucun effet civil tant qu'il n'a pas été rendu public par son inscription sur le registre civil. Toutefois ce mariage peut produire des effets civils *dès le jour de la célébration*, si les conjoints, d'un commun accord, sollicitent de l'évêque qui l'a autorisé, un extrait consigné sur le registre secret de l'évêché et le remettent directement, et avec la réserve convenable, à la direction générale du registre civil, en en demandant l'inscription. La direction générale tient, à cet effet un registre spécial et secret, avec les précautions nécessaires pour que le contenu n'en soit pas connu avant que les parties n'aient demandé que l'acte soit rendu public par une transcription sur le registre municipal de leur domicile ». In accordance with art. 76, LEHR, O. c., n° 361.

2. Cf. LEITNER, *Lehrb.*, p. 75, where he enumerates, for Germany and Austria, the families to which this special provision of the civil law applies.

3. Marriage may also be celebrated in the *morganatic* form between two persons of equal nobility, when the man is a widower and wishes to remarry, but cannot, according to the law of certain countries, place the children by a second marriage in the same rank as those by the first. See *Kirchenlexikon* under *Ehe zur linken Hand*.

4. Cf. BENEDICT XIV, *De Syn. dioec.*, l. XIII, c. 23, n° 12.

is due to the action of the *civil law*. This, in the different countries, admits or rejects the distinction (with distinct civil effects) between ordinary marriages and marriages contracted between personages of exalted rank and women of humbler birth. The distinction between ordinary and morganatic marriages, is almost entirely confined to Germany and Austria ⁽¹⁾.

The term *morganatic* is most probably derived from the German *Morgengabe*, in its more ancient form *Morgengeba*, which was a present given by the husband to the wife after the first night of the marriage, as the price of her virginity ⁽²⁾; for in a morganatic marriage the wife and the children do not share in the possessions and honours of the husband and father, except in a very limited degree; their portion is nothing more than a mere *Morgengabe* ⁽³⁾. These unions are also known as *left-handed marriages* ⁽⁴⁾ and marriages *according to the Salic law* ⁽⁵⁾.

We must not confound, as is often done, *morganatic marriage* with *marriage of conscience*, though they both frequently present the like characteristics. The difference consists in this, that a morganatic marriage may be celebrated in public, with the usual solemnities, and in the presence of a great concourse of people ⁽⁶⁾, while a marriage of conscience is by no

1. Thus the Belgian civil code ignores this distinction, and accordingly a civil marriage lawfully contracted by an exalted personage, even by the King himself, would still have the same civil effects, whether the bride were a princess or a seamstress. Moreover, in virtue of art. 60 of the Constitution, children lawfully born of such a marriage would not be excluded from the throne. The marriage of a prince with a woman of lower condition, that did not bring with it the above mentioned legal inequality, would be called *disparagium*. Cf. SCHNITZER, O. C., p. 36.

2. See LEFEBVRE, O. C., p. 427 s.

3. *Kirchenlexikon*, I. c.; FERRARIS, *Prompta Bibliotheca*, Vo *matrim. ad morganaticam*; SCHERER, O. C., par. 109, note 29; HEINER, *Grundriss*, p. 22; WERNZ, O. C., IV, n° 29; LEITNER, *Lehrb.*, p. 75 s.; FREISEN, O. C., p. 53 ss.

4. « Ehe zur linken Hand heisst sie, weil die Frau dem Manne nur an die linke Hand angetraut wird, zum Zeichen dass sie nicht als ebenbürtig in seine Familie tritt, daher auch nicht seines Standes theilhaftig wird ». HEINER, I. c.

5. « Das salische Gesetz bestimmte nun dass die cognati nur nach absterben der agnati zur Erbschaft gelangen sollten. Heiraten nach dem salischen Gesetze hiess also unter der Bestimmung heiraten, dass die Kinder alle, auch die Söhne, nur als cognati zu betrachten seien, die erst beim Fehlen der agnati zur Erbschaft gelangen sollten ». LEITNER, *Lehrb.*, p. 76.

6. The marriage of the Archduke Francis Ferdinand, heir to the crown of Austria, is a case in point. On the 1 July 1900 this prince married Sophia, Countess of Chotek. The marriage was contracted morganatically, after the prince had renounced the imperial dignity for his wife, and the right to the crown for his children; but it was solemnized with full ceremonial and with royal pomp.

means always morganatic : the man may not be of noble rank, or not so in the required degree for the special provisions affecting marriages of this kind to be applicable to him ; or, again, the civil law of the country may not admit of the distinction between morganatic and other marriages, and may not attach any distinct civil effects to such marriages. On the other hand, in countries where morganatic marriage is recognised by the civil law, it often has the same characteristics as marriage of conscience, for it is quite natural that a morganatic marriage should be celebrated as a marriage of conscience, since the reasons that render it desirable to keep the marriage secret are most frequently met with in families of princely or exalted rank ; while a marriage of conscience between a man of very high position and a woman of ordinary condition, will, in such countries, necessarily be morganatic, since the wife and children remain unrecognised, and cannot enjoy the titles and offices that pertain to the husband and father respectively.

SECTION II

THE MATRIMONIAL CONTRACT CONSIDERED
AS A SACRAMENT

In the *first* chapter we shall show that the matrimonial contract is, by the institution of Christ, a sacrament ; in the *second* chapter we shall treat of the connection between the contract and the sacrament ; and in the *third* chapter we shall explain the nature and the constitution of the sacrament, dealing successively with the minister, the effect, the subject and the ceremonies.

CHAPTER I.

THE EXISTENCE OF THE SACRAMENT OF MARRIAGE.

PROPOSITION. *The matrimonial contract between baptized persons is a sacrament of the New Law.*

The demonstration of this proposition can be made both *dogmatically*, for Catholics only, who admit the infallibility of the Church ; and *historically*, so as to appeal also to heretics, particularly Protestants (¹), and all those who reject this infallibility.

96.
Marriage is a sacrament.

I. Dogmatically.

1. *By the definition of the Councils*, and especially by that of the *Council of Trent*, Sess. XXIV, can. 1, which pronounces anathema against anyone who shall dare to maintain « that matrimony is

1^o Dogmatic demonstration.

1. Although at first, in some of his writings, *Luther* seems to acknowledge a certain sacramentality in marriage, yet he denied, and with increasing insistence, that marriage is a true sacrament (as we have noted above, n^o 55), in conformity with his principles concerning the nature and efficacy of the sacraments. According to him, marriage is not of a nature to stimulate faith, though the efficacy of the sacraments consists therein. Cf. GRISAR, *Luther*, II, p. 216 ss., and compare with *Friedberg*, *Das Recht*, p. 157 ss.

Calvin also utterly denied this sacramentality ; to him marriage was something merely profane: « Postremum est matrimonium quod, ut a Deo institutum fatentur omnes, ita pro sacramento datum nemo usque ad Gregorii tempora viderat. Et cui unquam sobrio in mentem venisset ? Ordinatio bona est et sancta ; et agricultura, architectura, sutrina, tonstrina ordinationes sunt Dei legitimæ, nec tamen sacramenta sunt ». FRIEDBERG, *Das Recht*, p. 185 ; cf. FAUREY, o. c., p. 50 ss., and HOWARD, o. c., I, p. 386 ss.

not truly and properly one of the seven sacraments of the evangelical law, instituted by our Lord Jesus Christ ».

The Church had already laid down the same doctrine in the Council of Verona, in 1184, at which Lucius III decreed : « universos qui de sacramento Corporis et Sanguinis D. N. J. Christi, vel de Baptismate, ... aut de *Matrimonio*, vel de reliquis ecclesiasticis sacramentis aliter sentire aut docere non metuunt, quam Romana Ecclesia praedicat et observat.... vinculo perpetui anathematis innodamus » (1). The second council of Lyons, in 1274 (2), and the Council of Florence (3) teach the same. Later, among other doctrinal documents of the Church, the Encyclical, *Arcanum*, of Leo XIII, is noteworthy (4), and also the decree *Lamentabili* censuring proposition 51 (5).

2. *By the unanimous and explicit belief of the Catholic Church from the XIII century at least.* No one can deny that since the thirteenth century the doctrine of the sacramental character of matrimony has been in full and peaceable possession, and that both the Doctors and the Schools have held it explicitly as a *doctrine of faith*. We have proof of this in the Councils and professions of faith, of which we have spoken above in 1. (6), no less than in the unanimity of scholastic theologians from the time of Peter Lombard and Saint Thomas (7). But everyone knows that,

1. C. 9, X, V, 7.

2. DENZINGER, *Enchiridion*, n° 465 : « Tenet etiam et docet eadem S. R. Ecclesia septem esse ecclesiastica sacramenta, unum scil. Baptisma... aliud est *Matrimonium* ».

3. « Septimum est sacramentum matrimonii ».

4. « Apostolis magistris accepta referenda sunt quae SS. Patres nostri, concilia et universalis Ecclesiae traditio semper docuerunt, nimirum Christum Dominum ad sacramenti dignitatem evexisse *Matrimonium* ».

5. « Matrimonium non protuit evadere sacramentum Novae Legis nisi serius in Ecclesia : siquidem ut matrimonium pro sacramento haberetur, necesse erat ut praecederet plena doctrinae de gratia et sacramentis theologica explicatio, » DENZINGER, o. c., n. 2051.

6. Cf. the documents given at length by PALMIERI, o. c., p. 52-54 ; PESCH, *Tractatus Dogmatici*, Friburgi-Brisgoviae, 1897, t. VII, n. 707 ss. ; POURRAT, o. c., p. 246-249 ; SASSE, *Institutiones theologicae de Ecclesiae sacramentis*, Friburgi-Brisgoviae, 1897, II, p. 35 s.

7. SCORUS, in *l. IV Sent.*, Dist. 26, qu. 1, unhesitatingly affirms : « Communiter tenet Ecclesia sacramentum Matrimonii esse septimum inter ecclesiastica sacramenta, et de sacramentis Ecclesiae non est aliter sentiendum quam sentit

according to Catholic principles, the belief of the Church constitutes an incontrovertible criterion of apostolic tradition, as often as it is universal and bears on a point considered as *belonging to the deposit of faith*.

II. Historically.

A. Indirectly, by argument from prescription.

It is a well known fact that the separated Oriental churches, that is to say, the Orthodox Greek, the Coptic, the Armenian and Nestorian, regard marriage as a sacrament. This is clear from their writings and formulas of faith (¹).

97.
Historical demonstration,
a) indirectly,
by argument
from prescription ;

This fact affords us *an argument from prescription* in favour of apostolic tradition by the following course of reasoning. The doctrine that the Greek schismatics, and other sects mentioned above, hold to-day, was held by them at the time of the schism, when they separated from the Catholic Church. For, once the separation was effected, it is not conceivable that sects differing from one another in belief, language, rites and customs, and all at variance with the Latin Church, could severally have introduced this particular point of doctrine, still less conceivable is it, that they should have accepted it unanimously from the Latin Church

Ecclesia Romana ». Among all the scholastics *Durandus* is the only exception, and even he confirms the tradition of the Church on this point. In l. IV, Dist. XXVI, qu. 3, he acknowledges that it is absolutely necessary to admit « that marriage is a sacrament, since the Church declares it to be so ». He is at variance with his contemporaries only in holding that the sacrament of matrimony is not altogether univocal with the other sacraments. Cf. SASSE, o. c., p. 366.

2. The Nestorian formula of 1553 reads : « We believe also in Holy Baptism, .. and in Holy Priesthood, and in Matrimony ». Simon Assemanus bears witness to the belief of the *Jacobites* and the *Copts* : « Ad sacramenta quod spectat, septenarium eorum numerum, qualis ab Ecclesia Catholica agnoscitur, apud Jacobitas sacrosanctum esse liquet ex eorum ritualibus .. ». Vartanus, Bishop of the Armenians, makes the same statement on behalf of his co-religionists, two centuries before the Council of Florence. In the case of the Orthodox Greeks, there is no lack of documents. One of the principal of these is the profession of faith of the Patriarch Jeremias, of 1576. The violent opposition experienced by Cyrillus Lukaris, a partisan of the Protestant sacramental system, is of equal significance ; as well as the profession of faith of 1642. Finally, in the rescript published by the Patriarch Anthimus against the Encyclical *Praeclara*, of Leo XIII, there is not the slightest protest against the sacramental dignity of marriage, or against the septenary number. See PALMIERI, o. c., p. 511 ; POHLE, *Lehrbuch der Dogmatik*, Paderborn, 1906, t. III, p. 395 s. ; POURRAT, o. c., p. 252-267.

after the separation. We must, therefore, go back to the ninth century for the Orthodox Greeks, and to the fifth century for the rest; whence we may well conclude that, in the fifth century, the doctrine of the sacramental character of matrimony was held by the Church both in the East and West.

Furthermore, it is hard to explain the unanimity of belief in the Church of the fifth century without admitting that the doctrine in question goes back to apostolic times. Were it otherwise, it is difficult to see how a doctrine of such importance could have been introduced into the entire Church without controversy and protest; but of this there is no trace to be found. (1)

98.
b) directly, by
evidences.

B. *Directly, by evidences and writings that go back to the apostolic age.*

Observe, that we must not expect to find in the early writings of the Fathers and Doctors of the Church, *that explicit and clearly defined assertion* of the sacramental character of matrimony, which appears in the pages of later theologians when they declare it to be an efficacious sign of grace.

The idea of a sacrament in general was only developed by degrees in the Church, especially as, in the early ages it, was not customary to treat of the sacraments methodically and systematically as at the present day. No attempt was made to formulate a generic idea of a sacrament that might afterwards be applied to each in particular (2); but from the beginning a

1. So TERTULLIANUS, *De Praescriptionibus*, c. 28: « Ecquid verisimile est ut tot ac tantae (Ecclesiae) in unam fidem erraverint?... Variasse debuerat error doctrinae Ecclesiarum. Caeterum quod apud multos unum inveniatur, non est erratum sed traditum ». Ed. Oehler, Lipsiae, 1854, II, p. 25 s.

2. There was some obscurity and ambiguity as to the meaning of sacrament and the sacramental doctrine down to the twelfth century. Thus St. Peter Damian († 1072), *Opera omnia*, Cajetan's ed., I, *Sermo* 69, having but an inexact and incomplete definition of a sacrament, reckons among them the dedication of churches, the anointing of kings, the veiling of nuns, and the like. See, however, the scholia of Cajetan on this passage, p. 378 s., and note that from this confusion in enumerating the sacraments, it does not follow that there was a like confusion of mind, since similar mixed series occur with Doctors later than Peter Lombard, who were well acquainted with the septenary number, and elsewhere accurately and explicitly teach that there are seven sacraments, giving them in their proper order, and distinguishing between the sacraments properly so called, which they term principal, and the minor sacraments or sacramentals. Cf. GILLMANN, *Die Siebenzahl der Sakramente bei den Glossatoren des Gratianischen Dekrets*, Mainz, 1909, p. 20 ss.

sacrament is proposed to the faithful as a sacred sign, as the sign of something holy. It is not *explicitly* declared to be an efficacious sign, but at the same time it is not put upon the same level as ordinary signs; it is asserted to be in some way associated with the spiritual gift of grace ⁽¹⁾.

It is not, therefore, surprising that, in ancient writings, the sacramental character of marriage is not found set forth in explicit terms, and with all the scholastic precision of later times; nevertheless, it is *implicitly* contained therein. These ancient writers describe marriage as a holy thing, to be consecrated by the rites of religion, a ceremony vivified by grace, and so forth, as we shall presently show. The evidences are for the most part obscure and confused, but they must be interpreted, as SASSE very rightly remarks ⁽²⁾, « by the light of later writings which, while making clear their true Catholic meaning, introduce no innovation into dogma, but rather afford an explanation and development of primitive belief » ⁽³⁾.

As concerns the Doctors who, in the early and latter part of the twelfth century, were the first, in a clear form and in an exclusive list, to teach that the sacraments are seven in number and neither more nor less, cf. GILLMANN, o. c.; DE GHELLINCK, *A propos de quelques affirmations du nombre septénaire des sacrements au XII^e siècle*, in *Recherches de Science religieuse*, I (1910), p. 493 ss.; POURRAT, o. c., p. 232-267; DE BIL, *L'attestation du nombre septénaire des sacrements chez Grégoire de Bergame*, in the *Revue des sciences philosophiques et théologiques*, 1912, p. 332 ss.; HEYER, *Theolog. Revue*, 1912, p. 189 ss. The first Conciliar text setting forth the exclusive list of the seven sacraments is that of the *Synodus Londinensis* (1237). Cf. SCHANZ, *Die Lehre von der hl. Sakramenten der kath. Kirche* Freiburg, i. B., 1893, p. 81.

1. For the evolution of the notion of sacrament, cf. POURRAT, o. c., p. 242; MEERSBOOM, *Le développement du dogme et le dogme du nombre septénaire des sacrements*, N. R. th., 1910, p. 607 ss.

2. O. c., II, p. 366.

3. Many dogmas of the primitive Church were known to the faithful only in an obscure and uncertain manner, and many were only implicitly believed in the beginning; but by a gradual and continuous advance, little by little they came to a more explicit knowledge, so that, as Vincent of Lerins remarks: « Quod antea simpliciter credebatur, hoc idem postea diligentius crederetur; quod antea lentius praedicabatur, hoc idem postea instantius praedicaretur ». On the development of dogmas consult the *Dict. de Theol. Cath.*, under *Dogme*; and the *Revue du Clergé fr.*, t. LXIV, p. 456 s., and see what is said *ibid.*, p. 448 ss., of the not very praiseworthy work of LEPICIER, *De Stabilitate et progressu dogmatum*, 2nd ed., 1910.

For the rest, even if one regarded the silence or doubtful utterances of some ancient writers as indicative of their *ignorance* of the sacramental dignity of marriage, it would be unreasonable to infer therefrom that marriage was not in the full sense instituted by Christ as a sacrament.

The fact that Christ directly instituted the sacrament of matrimony is quite compatible with the later development of the *knowledge*, and especially of the *precise* and *reflex* knowledge, of the fact; nor is there any reason why the early Christians should not have received the sacrament of marriage without being conscious of its sacramental dignity ⁽¹⁾.

It is needless, therefore, to follow in the footsteps of certain modern writers, and have recourse to the theory of the *mediate institution* of some of the sacraments, and of the sacrament of marriage in particular, as if Christ had not personally instituted this sacrament, but had given to the Church a mandate to do so, when the occasion arose ⁽²⁾. We may say the same of the theory of *implicit institution* advanced by POURRAT, o. c., p. 274, who broaches the opinion, that while all the sacraments were immediately instituted by Christ, some of them, as matrimony, « were not given to the Church fully constituted ».

Now let us turn to the *Fathers*, the *Rituals*, and the *iconographic monuments*.

99.
The witness
of the
Fathers ;

1. *The writings of the Fathers* as well as those of other ecclesiastical writers, even the most ancient, not only speak of marriage as a sacrament, but moreover insist on its holiness, on the special blessing that Christ has bestowed upon it, on the necessity of contracting it in a holy and religious manner before the Church, and on the special dignity peculiar to Christian marriage, differentiating it from the marriages of infidels. From the same writings we may further infer that marriage is accompanied by grace.

1. « Ce qui a pu s'ajouter dans la suite des siècles à ce sacrement (de mariage), ce n'est pas une *institution* plus explicite, ni le fait que ce sacrement aurait été plus tard pleinement constitué, ce ne peut être qu'une *connaissance* plus explicite de ce que le Christ avait implicitement révélé ». VAN DER HEEREN, in the *Revue d'Histoire ecclési.*, 1907, p. 803 ; Cf. *Collat. Brug.*, t. XVI, p. 643.

2. Cf. DE BAETS, *Revue Thomiste*, 1907, pp. 31 ss. ; cf. *Collat. Brug.*, t. XVI, p. 628 ss.

ST. AUGUSTINE speaks of it thus : « Our Lord, when invited, came to the marriage, that conjugal chastity might be strengthened thereby, and the sacrament of marriage shown forth » ⁽¹⁾. Again : « The good that marriage procures for all nations and for all mankind, consists in the propagation of the species and conjugal fidelity ; but beyond this, for the people of God, the *holiness of the sacrament* which renders it unlawful, even on repudiation, to marry another..., just as when a priest is ordained for the gathering of the people, even if no gathering of the people follow, nevertheless, in those thus ordained the sacrament of Order remains » ⁽²⁾. And finally : « Without a doubt, the peculiar property of this sacrament is to unite a man and a woman for life, indissolubly,... as long as they live the conjugal bond unites them, which neither separation nor intercourse with another person can remove,... just as the soul of an apostate, repudiating, as it were, its marriage with Christ, even after the loss of faith, does not lose thereby the sacrament of faith that it received at the baptismal font » ⁽³⁾.

ST. CYRIL OF ALEXANDRIA († 444) : « Our Saviour came to the wedding, not so much to assist at the festivities, as... to signify the principle of human generation... ; for, it was becoming that He, who was to renew the very nature of man, should impart his blessing not only to those who were already born, but that He should also prepare his grace in advance and sanctify the birth of those who were yet to be born » ⁽⁴⁾.

ST. EPIPHANIUS († 403) : « Christ seems to me to have been invited for two purposes : firstly, in order that... He might restrain the voluptuousness of men by the chastity and honour of marriage ; and secondly, that He might make good what was wanting, and satisfy it with the sweetness of a most delightful wine and with his grace » ⁽⁵⁾.

ST. INNOCENT († 417) : « Supported by the Catholic faith, we declare that marriage is that, which from the beginning was established by divine grace » ⁽⁶⁾.

POPE SIRICIUS († 398) admonishes the faithful, that « the sin, which

1. In *Johan.*, tr. IX, n° 2. *Migne*, XXXV, col. 1459.

2. *De Bono conjugali*, cap. XXIV, n° 32. *Migne*, XL, col. 394.

3. *De nupt. et concup.*, l. I, cap. 10. *Migne*, XLIV, col. 420.

4. In *Johan.*, II, 1-4. *Migne*, LXXIII, col. 223.

5. *Haeres.*, LI, n° 30. *Migne*, XLI, col. 942.

6. *Epist.* XXXVI ad Probum. *Migne*, XX, col. 602 ; HARDOUIN, o. c., I, col.

violates the blessing given by the priest to the bride, is like to a sacrilege » (1).

St. AMBROSE († 397) : « We know that God, as the Lord and guardian of marriage, does not suffer that nuptial bed should be profaned by a third person, and that, if one should do so, he sins against God, whose law he violates, and of whose grace he deprives himself. He who sins in this way against God, loses the benefit of the heavenly sacrament » (2).

In the work entitled, *TESTAMENTUM D. N. J. CH.*, Ed. Rahmani, I. II, c. I, p. 113, we read : « Let him (who desires to marry) marry a faithful Christian, the daughter of Christian parents, who knows how to preserve her husband in the faith ; (and let it be done) as the Bishop shall direct and ordain ».

ORIGEN († about 253) : « Since God is the author of the (marriage) union, those who are united by Him are the recipients of his grace » (3).

TERTULLIAN (born about 160) : « How shall we describe the happiness of that marriage, which the Church unites, the offering (*oblatio*) confirms, the blessing seals, the angels proclaim, and the Father ratifies » (4). And again : « If then, such a marriage is ratified by God, why should it not prove a happy one, so as not to be unduly harrassed by troubles, anxieties, obstacles and faults, since it has in part the protection of divine grace ? » (5).

St. CLEMENT OF ALEXANDRIA (born about 150) : « Marriage is holy ; the Apostle ascribes this mystery to Christ and to the Church » (6).

St. IGNATIUS MARTYR, († about 107) : « It is becoming that marriage should be contracted with the advice of the Bishop, so that the marriage may be according to the Lord, and not according to concupiscence » (7).

Lastly we have the well known testimony of Saint Paul (Eph., V, 22-32), who speaks of marriage as a *great sacrament*, *μυστήριον μέγα* (8), that is to say, a great sign or symbol representing the union of Christ with the

1. *Epist. I ad Himerium Episcopum Tarrac.*, c. 4. *Migne*, XIII, col. 1136 s. ; HARDOUIN, O. C., I, col. 848.

2. *De Abraham*, I. I, c. 7. *Migne*, XIV, col. 443.

3. *Comment. in Matth.*, t. XIV, n° 16. *Migne*, XIII, col. 1230.

4. *Ad uxorem*, I. II, c. Ed. Oehler, Lipsiae, 1853.

5. *Ibid.*, I. II, c. 7, same edition.

6. *Strom.*, I. III, c. 12. *Migne*, VIII, col. 1186.

7. *Ad Polyc.*, c. V, n° 2. Ed. Funk. See SOHM, *Das Recht*, p. 108.

8. Protestant interpreters have both the text and the context against them ; for, both refer the word *sacramentum*, not to Christ and the Church, but to Christian marriage, and an exact translation of the Greek would require, not the ablative, in *Christo et Ecclesia*, but the accusative, in (εἰς) *Christum et Ecclesiam* ; i. e., it is a mystery or sacrament in relation to Christ and the Church.

Church (1). This text, it is true, does not explicitly attribute to marriage the *efficacious sign of grace*, but, according to the words of the Council of Trent, Sess. XXIV, it clearly insinuates it.

Saint Paul's purpose in this passage is to explain the analogy that exists between marriage and the union of Christ with the Church. Now, according to his teaching, the union of Christ with the Church is of such a kind that the bride is therein sanctified and purified by grace ; consequently marriage ought also to bring to those united in its bonds a supernatural sanctification and purification. Marriage must, therefore, be no mere symbol, but a sign that sanctifies efficaciously (2).

2. *In the Rituals*, various extracts from which are given by MARTÈNE, O. C., L. I, P. 2, we find prayers in which marriage is set forth as a holy thing to be treated in a holy manner, and in which God is prayed to fill with grace the union that He has designed (p. 614); to pour forth upon his servants the abundance of his blessings, « that in their marriage husband and wife may be united in equal affection, in like mind, and in mutual holiness » (*ibid.*) ; « to fill the wedded couple with spiritual blessings for the remission of their sins and for the attainment of eternal life » (p. 614 and 621). God is there invoked as He « by whom the woman is joined to the man, and at whose hands the married life, established from the beginning, receives that blessing which, alone, has not been taken away either by the punishment of original sin, or by the judgment of the deluge » (p. 619); there our Lord is praised for having, by his grace, in a wonderful way disposed that, « what generation produces for the population of the world, regeneration turns to the increase of the Church » (p. 622).

100.
the witness
of the Rituals,

3. *In the iconographic monuments*, marriages are represented as religious rites, blessed by the Church and sanctified by the presence of Our Lord. Thus sometimes the bride and bridegroom bear in their joined hands the monogram of Christ ;

and of the
iconographic
monuments.

1. A mystery is called a *sign*, especially when it has reference to something else, as in the present instance. The mystery here relates to the union of Christ with the Church, as is shown by the preceding context, and particularly by the allegory of the head and the members.

2. Cf. VLAMING, O. C., I, n° 105, who develops this argument more at length. See also POHLE, O. C., III, p. 593 s. ; SASSE, O. C., p. 369 ss. ; SCHANZ, O. C., p. 718 ss.

sometimes Christ is represented as blessing them, or placing crowns upon their heads (¹).

101.
Grounds of
congruity.

The doctrine of the sacramental character of matrimony may be further strengthened on *grounds of congruity*, as St. Thomas suggests (²), inasmuch as the sacrament of matrimony serves to perfect a man in the spiritual life, in a manner analogous to that in which he is perfected in the physical life. For, as in the physical life there are different degrees of perfection for which provision must be made, so in the spiritual life there are corresponding degrees of perfection, for which it is congruous that a particular sacramental grace should be provided.

As the holy Doctor says : « in the physical life the perfection of the individual is two-fold, as it regards his own person, and the whole social community in which he lives, for man is naturally a social animal... In relation to the whole community man's perfection is again two-fold : as he receives the power of ruling others, and acting in a public capacity, the correlative of which in the spiritual life is the sacrament of Order... ; and as to the natural propagation of the species, which is effected by matrimony, both in the physical and spiritual life, since it is not only a sacrament, but an office of nature ».

Objection.

To the objection made against the sacramental character of marriage, that it does not produce what it signifies, viz., the union of Christ with the Church, we reply that, in accordance with the teaching of St. Thomas (³), we may distinguish in the sacraments a *two-fold signification* : in the first place they represent that which they contain, that is to say, the grace that they signify and at the same time produce ; but, in addition to this, they may represent something which they neither contain nor produce. It is in this way that the union of Christ with the Church is symbolised, but not produced by the marriage rite ; just as the baptismal ablution, besides being a sign, represents, without containing or producing them, the burial and resurrection of Our Lord.

1. Cf. MARTIGNY, *Dictionnaire*, under *Mariage chrétien*, p. 388 ; MARRUCCHI, o. c., p. 10 ss. ; ARMELLINI, o. c., p. 369. These two last named authors give a detailed account of a funeral monument, ascribed to the fourth century, and discovered in the Villa Albani. On this monument Christ is represented as placing crowns upon the heads of the husband and wife.

2. P. III, qu. LXV, art. 1.

3. BILLOT, o. c., I, p. 23 s.

CHAPTER II.

CONNECTION BETWEEN THE CONTRACT AND
THE SACRAMENT.

PROPOSITION. *In the marriage of Christians, there is no real distinction between the contract and the sacrament of matrimony, but only a logical distinction. Thus the one is inseparable from the other, and there cannot be a legitimate matrimonial contract between baptized persons, which is not at the same time a sacrament.*

102.

The sacrament of matrimony is the same as the contract of marriage between Christians.

Demonstration.

The contract of marriage itself has been raised to the dignity of a sacrament. Assuredly, if Christ took the Christian contract itself, and invested it with the sacramental dignity, it is obvious that the contract and the sacrament are *one and the same thing*, that there is only a logical distinction between them (*cum fundamento in re*), and that consequently they are inseparable from one another.

Proof :

This consequence is strongly insisted on by the Sovereign Pontiffs. Pius IX, in his allocution of 27 Sept. 1852, on the ecclesiastical affairs of the Republics of New Granada (Colombia), expressed himself thus : « No Catholic is or can be ignorant that marriage is really and properly one of the seven sacraments of the evangelical law, and that consequently there cannot be among the faithful any real marriage that is not at the same time a sacrament ; that, accordingly, among Christians any other than the sacramental union, no matter how sanctioned by the civil law, is nothing but a scandalous and fatal concubinage most strongly condemned by the Church ; and therefore that the sacrament can never be separated from the matrimonial compact... » (1). In like manner, Leo XIII, in his Encyclical *Arcanum*, says it is certain, that « in Christian marriage, the contract is not separable from the sacrament ; no real and legitimate contract is possible, which is not by the very fact a sacrament. For, Christ has raised marriage to the dignity of a sacrament ».

by the elevation of the contract to the dignity of a sacrament.

A number of ecclesiastical documents provide us with a proof that Christ did really raise the matrimonial contract to the rank of a sacrament. We find there the sacramental dignity clearly ascribed to the contract, that is to say, to the marriage itself, such as it exists in its natural character. Thus notably the Council of Trent, Sess. XXIV, *Doctrina de sacr. matr.*, et can. 1, simply states, without restriction, that marriage is a sacrament; and comparing marriage in the Old and the New Law, it declares that the only difference between them is this, that the latter is superior to the former in virtue of the sacramental grace. Moreover, what Christ raised to the rank of a sacrament, is that which, before Him, was but a mere figurative sign of his union with the Church, that is to say, the contract of marriage. Finally, in the *Syllabus* of Pius IX, n° 65, it is laid down in express terms, « that Christ raised marriage to the dignity of a sacrament ». DENZINGER, o. c., n° 1769. Leo XIII speaks to the same effect in the passage quoted above.

Errors opposed to this doctrine :

103.
Refutation of
errors:
of Nuytz,

1. *J. Nep. Nuytz* taught the *complete distinction* between the contract and the sacrament, asserting that « the sacrament of marriage is only an accessory to the contract.... and that sacrament has its place only in the nuptial blessing » (1).

of Melchior
Canus,

2. A second opinion, maintained by ESTIUS, in l. IV Sent., dist. XXVI, § 10 s., following MELCHIOR CANUS, *Opera Theologica*, Romae, 1900, tom. II, cap. VIII, held that the sacrament of matrimony is constituted by the contract, as the matter, and by the blessing of the priest, as the form, in such a way that there is an *incomplete distinction* between the contract and the sacrament, as between the part and the whole. This opinion is fully refuted by BELLARMINE, *De controversiis Christ. fidei*, l. unico, *de Matrimonio*, cap. VI-VIII.

of Billuart,
and others,

3. A third opinion is that of the SALMANT., o. c., Tract. XI, cap. III, n. 73 et seq.; of CARRIÈRE, o. c., p. 93 s.; of PONTIUS, o. c., l. I, c. IX, n. 1-6, and of BILLUART, *Summa S. Thomae*, in 3^m P., tom. VI, Dist. I, art. V, sub 5°. They admit that where there is a sacrament, there is always a contract, and that then

1. DENZINGER, o. c., n° 1766.

they are identical ; but they *deny* that where there is a contract between Christians, there is always *essentially and necessarily a sacrament*. Thus the SALMANT., l. c., n° 78, teach : « I reply, therefore, that marriage between Christians is still separable from the sacrament ; and consequently, if one intended to contract civilly, and through ill will, ignorance, or error, did not intend to receive the sacrament, the marriage would be valid as a contract... but not as a sacrament » (1).

For the refutation of these errors, a simple knowledge of the Catholic teaching is sufficient. To this may be added the Church's condemnation :

The error of Nuytz is condemned in the *Syllabus* of Pius IX, n° 66, where the true teaching of the Catholic Church is declared to be, that the sacrament is not an accessory or accidental addition to the contract. The opinion of the *Salmanticenses* and *Billuart*, and, a fortiori, the doctrine propounded by *Melchior Canus* and *Estius*, are rejected in the same *Syllabus*, n° 73, which condemns the following proposition : « In virtue of a purely civil contract, true marriage can be had between Christians ; and it is false to say that the contract of marriage between Christians is always a sacrament, or that there is no contract if the sacrament is excluded » (2).

Objection. The authors mentioned above, notably Billuart, appel to 104.
An objection
and its answer.

1. Cf. BILLUART, l. c. : « In raising the matrimonial contract to the dignity of a sacrament, Christ has not weakened the natural efficacy of the contract, but only added to it a supernatural virtue, just as in giving to the baptismal ablution the sacramental character, he did not take from it its physical efficacy, but communicated to it the additional supernatural power of cleansing spiritually, in other words, of sanctifying ; and so with the other sacraments. Consequently just as the result of the baptismal ablution, without the intention of conferring the sacrament, would be a real washing of the body without producing the sacrament, so he who contracted marriage without the intention of receiving the sacrament, would make a real and valid contract without producing the sacrament, because intention is required for the validity of a sacrament ».

2. DENZINGER, o. c., n° 1766 and 1773. In the *Causa Colonien.*, 27 Aug. 1910, (*Acta Ap. Sedis*, 1910, p. 933), the S. Rota declared that the doctrine affirming the impossibility of separating the matrimonial contract from the sacrament, concerns faith (*fidei proxima*) ; consequently those who deny it come very near to heresy (*haeresi proximi*).

the sacrament of Baptism, and say that just as there may be the ablution without the sacrament, e. g., if the minister has not the intention of conferring it, so there may be the matrimonial contract between Christians without the sacrament, with those who intend the former but not the latter.

We *deny the parity*. Certainly in the sacrament of Marriage, as in that of Baptism, the intention to perform the sacred rite is requisite on the part of the contracting parties, who are here the ministers; but, among Christians, when the contract is intended, the sacrament also is necessarily intended, at least implicitly, seeing that it is one with the contract, in consequence of the elevation of the latter to the sacramental dignity. On the other hand, one can perfectly well intend the ablution, without intending the sacrament of Baptism, since the ablution itself is not the sacrament; it is only the matter of the sacrament, of which the invocation of the most Holy Trinity is the form; hence every ablution is not a sacrament, but only that to which the minister proceeds in due form and with the intention of administering the sacrament, conditions required in the case of every sacramental matter and form.

105.
Fate of the
opinion of
Melchior Canus.

Note. ESMEIN, O. C., II, p. 160, observes that the incomplete distinction between the contract and the sacrament, proposed by Melchior Canus, is contrary to the primitive teaching: « c'était la tradition ancienne et la doctrine constante des canonistes, qu'il était impossible, dans le mariage des chrétiens, de séparer le contrat du sacrement; que le contrat lui-même avait été élevé par la nouvelle loi à la dignité de sacrement, et absorbé par le sacrement, si bien qu'on ne pouvait plus concevoir l'un sans l'autre ». Elsewhere, I, p. 70 s., he speaks to this effect: « Ceux qui ont imaginé la distinction, ce sont les théologiens...; ce qui me paraît avoir donné lieu à la distinction, ce sont certains cas où les canonistes reconnaissaient traditionnellement des mariages valables entre chrétiens, et où les théologiens ne trouvèrent pas les conditions requises pour l'existence du sacrement, spécialement quant à la forme: par ex. le mariage qu'un muet contractait par signes, le mariage contracté par procureur, les mariages présumés du droit canonique. Les théologiens, pris de ces scrupules, ne pouvaient abolir la doctrine, solide et constante des canonistes, qui reconnaissaient la validité de semblables mariages; la conclusion à laquelle ils furent naturellement conduits fut de déclarer que, dans ces hypothèses, le mariage des chrétiens était bien un contrat, mais non un sacrement ».

This opinion, which Melchior Canus supported with a variety of proofs, was admitted and proposed by many of the Fathers at the Council of Trent (¹), the more readily as they found therein an easy way of reconcil-

1. ESMEIN gives a complete list of the Fathers who were of this way of think-

ing with the substantial immutability of the sacraments the power of establishing matrimonial impediments, and especially of annulling clandestine marriages, possessed by the Church.

At a later date, the *Gallicans* abused this distinction to vindicate the claim of the civil law to regulate marriage in so far as it is a contract (1). One is surprised to hear Benedict XIV, *De Syn. dioec.*, l. VIII, c. 13, declaring very probable the opinion that teaches this distinction, as « based on very solid arguments » and « strengthened by the support of so many doctors ». He acknowledges, however, that the contrary opinion (n° 4) is more common ; and this is the only one given by him in his *Apostolic letter* to the Archbishop of Goa, of 19 March 1578, (in the *Collect.*, n° 1301).

Corollary I. Baptized parties, really intending to make the matrimonial contract, receive at the same time the sacrament. If their predominant intention was to exclude the sacrament from the contract, not only would there be no sacrament, but « there would be no contract either, since they intended this last, only under an impossible condition », viz. the separation from the sacrament. Cf. THEOL. MECHL., o. c., n° 27, qu. 2. *Practical conclusion.*

Corollary II. When unbaptized persons, united in lawful marriage, receive baptism, their marriage thereby becomes a sacrament, and there is no need for the renewal of their consent. Their marriage is not annulled by the conversion of the two parties, and so, being valid, it necessarily becomes a sacrament ; consequently it matters little whether they have renewed their consent or not, or even if they have invalidly revoked it ; for, between baptized persons, there cannot exist a marriage that is not at the same time a sacrament. 106.
Marriage of the unbaptized becomes a sacrament by the baptism of both parties,

For the further *explanation* of the way in which a marriage formerly contracted becomes a sacrament through baptism, it is sufficient to say that, since the matrimonial consent virtually perseveres (2), it becomes a sacrament spontaneously by the fact of the baptism of the two parties, just as the consent that was previously given invalidly and still virtually

ing, o. c., II, p. 369, according to THEINER, o. c., II, p. 314 ss.; but there are several of them whose words may easily be understood in the sense of a simple logical distinction. Among these may be mentioned Didacus de Payva, and the Bishops of Lanciano, Metz, Orense, and Namur.

1. See below, nos 226 and 227.

2. The consent is considered to persevere, even when the parties have revoked it, seeing that such revocation is altogether inoperative.

endures, is made valid by a *sanatio in radice* (¹). Moreover, there is certainly no reason why this consent, which morally perseveres and is outwardly manifested by a continuance of the married life or otherwise, should not constitute the sacramental sign.

It follows from this that there is no necessity for a new consent to constitute the matter and form of the sacrament, as some contend. Quite apart from the fact that this theory of the necessity of a renewal of consent is irreconcilable with the identity of the contract and the sacrament, the renewed consent would serve no purpose: it could not constitute a fresh matrimonial contract, and consequently it could not serve as a new sacramental sign; since the marriage contracted in infidelity still remains valid (²).

107.
but not of one
only.

Scholion. In the hypothesis that *one only* of the parties receives baptism, we are of opinion that *the marriage does not become for him a sacrament*.

The reason of this is that it is impossible that the *marriage bond* should be sacramental for one and not for the other; for then, by reason of the sacrament, this bond would be stronger on the one side than on the other; which involves a contradiction.

As St. Thomas says: « Marriage (*in facto esse*) is a relation, and every relation is mutual; consequently that which puts an obstacle to marriage on the one side, is equally an obstacle to it on the other; it is not possible that one should be a husband without having a wife, or a wife without having a husband, just as there is no mother where there is no child. This is why it is commonly said that marriage does not limp » (³). BILLOT (⁴) is yet more clear: « As it is impossible that conjugal rights should affect only one of the parties, so also it is impossible that the obligation of the husband with respect to the wife should be *stronger* than that of the wife with respect to the husband, or vice versa ».

But if the *marriage bond* cannot be sacramental on one side only, the same must be said of marriage *in fieri*, that is to say of the giving of consent. For, according to the doctrine which we shall presently set forth, in nos 108 and 112, on the subject of disposing causality, the outward

1. Cf. LEITNER, *Lehrb.*, p. 66 s., and below, n° 408.

2. « For, as PERRONE observes, o. c., II, p. 281, what has once been given irrevocably cannot be given again; but it is thus that even unbaptized parties mutually surrender to one another the ownership of their respective bodies by the contract of marriage ». Cf. also BILLUART, l. c.

3. *Supplem.*, qu. 47, art. 2.

4. O. c., II, p. 357.

rite becomes the sign practically signifying grace ; only by means of the marriage bond, which is the *res et sacramentum* ⁽¹⁾.

If the line of argument that we have taken is adopted, then our solution holds good not only for the hypothesis in question, but also for the case of a marriage contracted by papal dispensation between a Christian and an unbaptized person, so that even then the marriage does not limp ⁽²⁾.

CHAPTER III.

NATURE, MINISTER, EFFECT, SUBJECT, CEREMONIES OF THE SACRAMENT OF MATRIMONY.

ARTICLE 1. Nature of the sacrament.

I. Meaning.

The identity established above between the Christian contract and the sacrament of matrimony permits us now to define its nature and its constituent elements.

108.
*Meaning of
the sacrament
of marriage.*

The sensible sign, the *sacramentum tantum*, is here the mutual consent of the parties. This consent produces the sacramental bond of marriage, which, of its nature, requires a special grace for the faithful discharge of the duties connected with it. Undoubtedly every valid matrimonial contract produces this bond of marriage, but it is not sacramental in marriages between unbaptized persons, and therefore it does not require the infusion of a sacramental grace ⁽³⁾.

1. Without doubt it is not impossible that *one only* of the parties should receive *the sacramental grace* in marriage ; and it is quite natural that those who hold the opinion affirming the *immediate* causality of the sacraments, who see in the sacrament only the sensible sign directly conferring grace, without any intermediate effect, should take advantage of this to oppose our theory, as many, indeed, do.

2. There are not wanting authors who reject this last opinion, though they are in agreement with us as to the first hypothesis. For example, PERRONE, o. c., II pp. 289-294 ; LEHMKUHL, in his note on SASSE, o. c., II, pp. 390-392, though this same author, in the *Catholic Encyclop.*, IX, p. 713 s., appears to favour the opinion given in the text.

3. For the better understanding of this idea one must keep in view the general theory regarding the constitution of the sacraments and their causality. We have treated of this at length in the *Coll. Brug.*, t. III, p. 517 ss. See also below, n° 112.

The sacramental bond is known as the *res et sacramentum*; the special grace, to which it gives a right, as the *res*.

II. Matter and Form.

109.
Matter and
Form.

The *proximate matter* and the *form* of the sacrament of marriage are deduced as a corollary from the definition given, and from the sacramental character of the contract, as BILLUART clearly teaches, o. c., *ad Suppl.*, Dissert. I, art. 7: « I say, the *proximate matter* of the sacrament of matrimony is the *words of the contracting parties*, as expressing the mutual *transfer* of the right of ownership over their respective bodies; the *form*, these same words, as expressing the *acceptance* of this transfer. For the words: *I take you for wife, I take you for husband*, signify on each side not merely the acceptance, but moreover the transfer of personal right into the hands of the other party; without which there would not be any marriage. Consequently the same words, looked at from different points of view, are the matter and form.

Proof: The sacrament of matrimony is no other than the civil (natural) contract raised to the dignity of a sacrament, without any change affecting the matter or form; thus the matter and form of the sacrament are those of the contract. But in civil contracts, and consequently also in the matrimonial contract, the delivery of the object or the duly manifested consent to its delivery serves as the matter, the acceptance or duly manifested consent to accept serves as the form. To prove the minor: The matter is the *determinable* element, the form the *determinative*... But in every civil contract, the delivery of the object is the determinable element, and, for a perfect contract, requires completion by acceptance, which is the determinative element. Therefore... » (1).

1. BENED., XIV, *Litt. Ap.*, 19 March 1758 (*Collect.*, n° 1391, p. 499), teaches the same: « The lawful contract is at the same time the matter and form of the sacrament of matrimony: namely, the mutual and lawful transfer of bodies... the matter, and in like manner the mutual and lawful acceptance of the same, the form ». For other views see BENED. XIV, *De Syn. dioec.*, l. VIII, c. XIII, n° 2, where he gives the different opinions; St. THOMAS, in IV *Sent.*, Dist. XXIV, qu. 2, a. 1; SANCHEZ, o. c., l. II, Disp. V, n°s 6-7; SALMANTIC., o. c., Tr. IX, c. III, dub. II; SUAREZ, *Disputationum in 1ert. Part. S. Thomae*, Tom. III,

There is *no opposition* between this theory and the doctrine of the Council of Florence, which teaches that the mutual consent is the *efficient cause of marriage*; for, the word marriage is there used in the sense of the marriage bond, i. e., of marriage *in facto esse*, of which the consent is in fact the efficient cause.

ARTICLE 2. Minister of the sacrament.

PROPOSITION. *The contracting parties themselves are the ministers of the sacrament.*

A. Proofs :

1. The first and principal argument is drawn from the identity of the sacrament and the contract, in the case of baptized persons; from this identity it clearly follows that the parties making the contract produce the sacrament, and consequently are the ministers of it.

110.
The contracting parties are the ministers of the sacrament.

2. As a confirmation of this, we may add that clandestine marriages, contracted by the parties alone and without the presence of a third person, are valid of themselves, as regards both the contract and the sacrament: of course, in so far as they are not invalidated by the Church (*). Thus, even at the present day, all marriages of this kind, that are exempt from the law of clandestinity, are perfectly valid.

3. Finally, in order to show that the minister of this sacrament is *neither the parish priest nor the delegated priest*, whose presence is required for the validity of marriages subject to the law of clandestinity, it is sufficient to turn to the preparation of the decree *Tametsi* during the Council of Trent. We there clearly see that the office of the priest is merely that of an *authorized witness*. In fact, the first two propositions submitted to the Fathers of the Council required only the presence of any three witnesses whatsoever; the two following required that one of the three witnesses should be a priest, but they restricted his office to that

Disp. II, sect. I; BELLARMINE, o. c., c. 6. PALMIERI, o. c., thesis X, sub VII; WERNZ, o. c., n° 47, together with note 199.

I. « Although it is not to be doubted that clandestine marriages, made with the free consent of the contracting parties, are valid and true marriages, so long as the Church has not invalidated them... ». *Conc. Trid.*, Sess. XXIV, c. I, *De Reformatione Matrimonii*.

of a simple witness ; some even wished to substitute a notary for him (4).

B. Explanation.

1. Baptized parties bring the sacrament into being by the self-same giving of consent that produces the contract ; and the words by which they express this consent, constitute at the same time the matter and form of the sacrament : the matter, in that they express the mutual *transfer* of the right of ownership over their respective bodies ; the form, in that they express the acceptance of this transfer, according to what we have said above in art. 1.

To speak precisely, the contracting parties *discharge the office of ministers* in that they *place the form* of the sacrament ; in other words, inasmuch as their acceptance ratifies the transfer of ownership made by the respective parties, not in that they place the matter and the form (5).

2. It does not matter if the parties are ignorant of their ministerial office ; « for by the very fact that they intend to contract marriage in accordance with the divine institution and the practice of the Church, they have the intention of doing what the Church does, that is to say, what Christ instituted » (6). But, apart from any special objection to such a course, there is no reason why they should not be enlightened on this subject, whatever some writers may think of it. Such knowledge is of a nature to increase in them the respect due to the sacrament, and to encourage them to approach it more worthily.

1. The Holy Synod, according to the first formula, « ordained and decreed that those marriages which for the future should be contracted secretly, *without the presence of three witnesses*, should be invalid and null ». THEINER, O. C., II, p. 314 ; in the following pages he gives the other formulas also. See too PERRONE, O. C., I, p. 149-152 ; ESMEIN, O. C., II, p. 155-169.

2. This gives us an opportunity of answering a possible objection to the effect that, according to us, Christ himself would contract marriage, since He is the principal minister of the sacrament, and that therefore to Him, as the principal agent, the action of the ministerial cause must be attributed. We reply that the office of minister, as such, is confined to the simple ratification of the mutual transfer, and that it is not unworthy of Christ, in His sovereign capacity, to sanction and seal the marriage bond.

3. THEOL. MECHL., O. C., n° 30.

3. In marriages contracted *by proxy* or through an interpreter, these are not the ministers, but only the principals for whom they act (¹).

Note. *Melchior Canus* is the principal opponent of the common doctrine, and he holds that the priest is the minister of the sacrament of matrimony. His theory is a logical consequence of the opinion that he held as to the incomplete distinction between the matrimonial contract and the sacrament, regarding the contract as the matter, and the blessing given by the priest as the form.

As we have said above, n° 105, one is surprised to find Benedict XIV, *De Synodo dioec.*, l. VIII, c. 13, n°s 2 and 4, declaring this opinion solidly established and very probable on account of the extrinsic authority of the Doctors favouring it, especially William of Paris and Paludanus (²).

Corollary. The words used by the priest in blessing the marriage : *I join you in marriage, in the name of...*, do not constitute in any way the form of the sacrament, nor do they contribute at all to the constitution either of the contract or of the sacrament. This is clear from what has been said above, and receives confirmation from the action of the Council of Trent in permitting the priest to use other words, «according to the received rite of each province » (³). Moreover, as MARTÈNE observes, o. c., l. I,

111.
Office of the
priest blessing
the marriage.

1. This is why, in marriages of this kind, the principals, that is to say, the real contracting parties, must have at the moment when the consent is given by their proxy, and when consequently the sacrament is constituted, at least a *virtual* intention of contracting marriage and receiving the sacrament, and a merely *habitual* intention does not suffice, as LEHMKUHL declares, o. c., II, n° 49. The intention of the principal *virtually* perseveres in the commission previously given by him, and in virtue of which, consent is given by his proxy ; consequently it matters not if, at the moment the consent is manifested and the sacrament constituted, the real contracting party does not advert to it, or is drunk, or asleep, or even temporally insane. See the solution of the case given in the *Anal. eccles.*, 1901, p. 430 ss., also above, n° 79.

2. The like doctrine is maintained in the *Tractatus Theologiae Nanceiensis*, to be found in MIGNE, *Theologiae Cursus Completus*, tom. XXV, Paris, 1863, col. 790 ss. There, *inter alia*, appeal is made to the decree of the Council of Florence, in which it is taught that the sacraments are constituted by *words* as the form, while the contracting parties can contract marriage by *signs of assent* ; but no attention is paid to the fact that the words are not to be taken too literally, and that the force of them must not be unduly insisted upon, seeing that the same decree teaches that the matter consists in *things* (*rebus*), though in the sacrament of Penance the acts of the penitent constitute the matter.

3. Sess. XXIV, l. c. ; cf. BENED. XIV, *De Syn. dioec.*, l. VIII, c. XIII, n° 6 :
« The Church would not have tolerated such a variety of formulas, much less

P. 2, c. IX, art. 3, these words were not used in former times, and are not found in the ancient rituals.

The words pronounced by the priest signify that the marriage which has just been contracted is ratified and solemnized by the Church through his instrumentality, and this is clearly shown by the various formulas employed in different places ⁽¹⁾.

Still it is quite intelligible that the priest should often be spoken of as the minister of the sacrament by those who are not in the habit of speaking in the precise language of theology. For he is the authorized witness assisting at the marriage in the name of the Church ; and moreover acts as the minister of the liturgical rites that surround the sacrament, as it occurs in the supplying of the ceremonies omitted in private baptism.

The blessing given by the priest is a sacramental (*sacramentale* quoddam), and, being given in the name of the Church, it is efficacious in bringing down the blessing of God upon the newly married pair.

ARTICLE 3. Effects of the sacrament.

112.
Effects of the
sacrament :

In the whole of this section, the word marriage is used as signifying the *sacramentum tantum*, i. e., the sensible sign ; it accordingly signifies the actual consent, and not the *res et sacramentum*, that is to say, the conjugal bond, to which the term sacrament is also sometimes applied in a looser sense.

the conjugal
bond,

The *first effect*, the *res et sacramentum*, is the **conjugal bond**, whereby husband and wife are united and associated with one another as a common principle for the generation and education of children ; this bond requires, as a disposing cause, the infusion of the sacramental grace ⁽²⁾. It lasts until dissolved by some legitimate cause, e. g. by the death of one of the parties.

and the grace.

The *second effect*, the *res*, in the **grace** itself, the habitual or sanctifying grace which, in so far as it is peculiar to this sacrament, gives an unailing right to those abundant actual graces

have allowed each country its choice, had it regarded the sacrament of marriage as constituted by the words of the priest ».

1. The following are specimens given by PERRONE, O. C., I, p. 154 : « Therefore I confirm, ratify and bless the marriage that you have contracted, in the name of the Father, etc. ». « May God confirm the marriage that you have contracted before the Church, and I, by the authority of the Church of God, approve, perfect and solemnize it, in the name of the Father, etc.

2. Concerning the nature of the *res et sacramentum* and its relation to grace, see the *Coll. Brug.*, t. III, p. 518 ss.

that enable husband and wife to bring up their children in holiness, to dwell together in peace, and duly to fulfil the other duties of their married state.

The grace of the sacrament is *of itself* the *gratia secunda*, since the conjugal bond, whereby husband and wife become a principle for the procreation of offspring to the multiplication of the children of God, naturally supposes that they are themselves the children of God through grace. Nevertheless, under exceptional circumstances, marriage confers the *gratia prima*, viz., in the case of one who marries in a state of grievous sin of which he is unconscious, but who has at least habitual attrition.

The first effect invariably follows the valid reception of the sacrament, i. e., the valid matrimonial contract between baptized parties.

The second is produced as often as there is no obstacle in the way of the grace. If there is an *absolute* obstacle, that is to say, a state of grievous sin that is conscious, or even unconscious, but with a habitual attachment to grievous sin, grace is altogether wanting, and the sacrament without fruit. If there is a *relative* obstacle, the sacrament is relatively unfruitful.

The sacrament of marriage received validly, but unfruitfully, may *revive* during the persistence of the *res et sacramentum* or sacramental conjugal union; for that, it is necessary that the obstacle, whether absolute or relative, should be removed.

Observe that, while the sacrament of marriage cannot exist in one of the parties without at the same time existing in the other, it may nevertheless be fruitful for the one and unfruitful for the other; and in like manner it may revive for the one without reviving for the other.

ARTICLE 4. Subject of the sacrament.

I. The subjects **capable** of receiving the sacrament of marriage are respectively a man and woman, who are capable ^{113.} *Capable sub-* ^{jects.} (1) of contracting validly and are both baptized.

II. For the **validity** of the sacrament, in addition to the valid ^{114.} *Dispositions*

1. We shall speak later on of the conditions required for the ability of the contracting parties, when we treat of the impediments of marriage.

of the subject :
for the validity of the sacrament ;

and lawful consent, it is necessary that there should be the intention of receiving the sacrament, and the intention, at least implicit and virtual, of bringing it about in the name and by the authority of Christ. This twofold intention, as we have said, is sufficiently contained in the will to contract marriage in the manner that Christians contract it.

115.
for its efficacy ;

III. In order that the sacrament may be **fruitful**, it is necessary to remove every obstacle, whether absolute or relative, according as it is a question of the *fructuositas simpliciter* vel *secundum quid*.

The absolute obstacle is removed, for him who is conscious of his sin, by the recovery of the state of grace in any way whatever ; for him who is not conscious of his sin, by the withdrawal of all attachment to mortal sin.

He who knowingly receives the sacrament of marriage in mortal sin *receives it unworthily*, and therefore commits a sin of *sacrilege*. It cannot, however, be said, as a general rule, that he commits another sin in that he is an unworthy minister ; because, in the first place, it is doubtful if on this head a new species of sin is added, to the former, and, in the second place, even if it is added, objectively speaking, the delinquent will not, as a rule, be guilty of it, owing to the want of advertence.

IV. That the reception of the sacrament may be **lawful** :

116.
for its lawfulness.

We are not speaking here of the different formalities required by marriage as a contract, and we also omit for the present the question of necessary religious instruction, of which we shall speak below in n° 331, but we will now give our attention to the much debated point, whether it is or is not necessary that **sacramental confession** should precede the reception of the sacrament of matrimony. It seems quite clear that *no divine or ecclesiastical precept prescribes preliminary confession*. For :

Preliminary confession is not strictly required, either by the divine law,

A. The *divine law* does not of itself impose it. It is true that marriage is a sacrament of the living, and so, by the divine law, is to be received in a state of grace ; but grace already exists in the souls of the just, and sinners can obtain it by a perfect act of contrition. There is no positive divine law which makes *confession* obligatory for them, as a preparation for marriage ; such as exists, for example, with regard to the reception of Holy Communion.

B. The *common ecclesiastical law* is equally silent on the point and prescribes nothing. Thus the Council of Trent, Sess. XXIV, cap. I, *De Reformatione Matrimonii*, exhorts, but does not oblige, the parties, « before contracting marriage, or at least three days before its consummation ⁽¹⁾, carefully to confess their sins, and piously approach the Most Holy Sacrament of the Eucharist ». The *Roman Ritual*, *De Sacr. Matrim.*, n° 17, desires that the parish priest should « admonish the parties, before contracting marriage, to confess their sins carefully, and piously approach to the Most Holy Eucharist, and to the reception of the sacrament of Matrimony ». This admonition, to be made by the parish priest, considering the discipline of the Council of Trent, does not imply a real precept binding the parties about to be married, as BARRUFALDI admits, *Commentaria ad Rit. Rom.*, tit. XLI, n° 181. or by the
common eccle-
siastical law,

C. The *diocesan law*, in many places, and in particular in the diocese of Bruges, more or less requires preliminary confession ⁽²⁾. But one may well ask if this discipline concerning or by the
diocesan law,

1. This exhortation to confession and communion is especially directed against *witchcraft*, which, in the common opinion of the time, often prevented intercourse, brought about sterility in women, or procured abortion. As an efficacious remedy against such evil machinations, the Fathers of the Council recommended the pious frequentation of the sacraments, and this is why they insist that the parties should go to confession and communion, if not before the marriage, at least three days *before its consummation*, as a preparation for it, having before their eyes the counsel of the Angel Raphael to Tobias, *Tob.*, VI.

Such *witchcraft*, in the Middle Ages and indeed long after, had the reputation of being in extensive use, and many diocesan decrees provided various penalties against it, which may be found, in the *Nouv. Rev. theol.*, V, p. 304 seq. Among the cases formerly reserved in the diocese of Bruges, a treatise dating from about 1752, mentions, p. 112, the *ligatura*, a species of witchcraft, called by the Flemings « den nestelinck knopen », and by the French « nouer l'aiguillette ». The effect of this, says the work in question, was, « to render husbands cold and bewitched, i. e., unfit for the conjugal act » ; it was worked by making a certain knot while pronouncing certain words, and was employed also « for procuring abortions and difficult confinements, and for causing children to die before baptism ». The author adds that this practice was at that time « more common, especially in the country, among young people under the influence of love and jealousy, than one unacquainted with the matter could bring himself to believe ». Cf. FRANZ, o. c., II, p. 178-184.

2. The *Liber Manualis* of the diocese of Bruges has, p. 189 : « Those intending to marry must be admonished to go to confession at least three days before the

going to confession *immediately* before marriage, is of *precept*, or merely of *direction and advice*. The *Nouv. Rev. theol.* does not decide the question, in its article in vol. V, p. 314. Yet on the one hand, the wording of the decrees does not oblige us to regard them as imposing a strict obligation on the parties under pain of refusal of marriage ; and on the other hand it is more in conformity with the principles of the law, to interpret the regulation in its less rigorous sense.

And in truth, as we have just seen, preliminary confession is not required either by the divine law or by the common ecclesiastical law ; and those who omit it do not deserve always and indiscriminately to be deprived of the nuptial blessing, for instance, such as have no mortal sin on their consciences. Moreover, we must remember that the Bishop has no power to set up fresh impedient impediments to marriage, as Benedict XIV acknowledges, *De Syn. dioeces.*, l. VIII, cap. XIV, n° 5.

*but is to be
very strongly
advised.*

In addition to this, episcopal and synodal decrees exacting evidence of confession, have more than once been modified by Rome, in the sense that evidence of confession may be *asked for*, but *not exacted* ⁽¹⁾, and consequently, that marriage may not be refused to the recalcitrant ⁽²⁾. Cf. the decree of the S. C. de P. F., of 21 Sept. 1840 (*Collectan.*, n. 197) ⁽³⁾ ; and compare with the decree of the same Congregation of 17 Apr.

solemnization of their marriage, and to go to communion on the day preceding it... Moreover he (the parish priest) will direct them to bring him, before the celebration of the marriage, their *billet de confession* ». It further says : « It is also our desire, in order to avoid various difficulties, and to ensure the more fruitful reception of the sacrament of matrimony, that the Rev. parish priests should advise those about to marry to approach the sacraments, on the day on which the first publication of their banns is made, as that is a solemn occasion for them ».

1. The preliminary confession is undoubtedly very opportune, and even the two confessions at fixed dates, as recommended in the diocese of Bruges : that so any impediment may be the more readily discovered in time, and embarrassment avoided.

2. For the line of conduct to be adopted towards them, see below, n° 118.

3. The Sacred Congregation, when asked to approve a decree exacting evidence of confession, replied : « quoad fidem confessionis, *suadendum* ut exhibeant ; sed, si renuant, non ideo a matrimonio excludendi ».

1820 (*ibid.*, in note, and n. 1521); also the decree of the S. C. C., of 28 Aug. 1852, in the *Analecta jur. Pont.*, I, p. 704 ss., and BANGEN, *Instr. prat.*, II, p. 233 ss. Cf. also DE BECKER, *De Matr.*, p. 267; *Collat. Nam.*, 1904, pp. 85 s.; *Nederl. Kath. Stemmen*, 1905, p. 21 ss.; and, in a different sense, *Rev. du clergé français*, t. L, p. 745 ss.

Scholion. Assistance of the parish priest at the marriage of persons unworthy to receive the sacrament.

A. If they are **occult** sinners :

The parish priest who knows of the bad dispositions of a prospective bride or bridegroom through confession only, cannot refuse to assist at the marriage, even when celebrated secretly; but in the confession itself he can and ought prudently to deter the penitent from such a sacrilege (¹). If his knowledge is derived from extra-sacramental information, he ought still to permit the marriage when it is to be celebrated publicly, but not when it is to take place privately.

117.
When and how can the parish priest assist at the marriage :

¹o of an occult sinner ;

B. If it is a question of **public** sinners (²) :

²o of a public sinner,
a) ordinary,

1. *Ordinary* public sinners are such as, through their own fault, are ignorant of the rudiments of Christian doctrine, and refuse to fulfil their religious duties, though without denying their faith. A parish priest cannot assist at their marriage, *except for some grave and proportionate reason*.

Such assistance is *of itself illicit*, seeing that it involves co-operation (in a wide sense) with the sacrilege committed by the unworthy party, and the more so, as the parish priest is bound in justice to watch over the safety of his people and keep them from sin.

Nevertheless, this cooperation is permissible, as often as there is a *proportionate excusing cause*. This will be the case whenever the good of a third party, e. g., of a child, or the good of the

1. It may sometimes be best to say nothing, when the party concerned is more or less in good faith, and there is no prospect that the admonition will prove effective.

2. We do not speak here of *pagans* and *heretics*. With regard to them, it is necessary to take into account the special laws of the Church, of which we shall speak, when dealing with the impediment of *disparitas cultus* and of *mixtae religionis*.

contracting parties themselves, or the necessity of preventing further sins, or of avoiding scandals, demands the marriage. Thus, a parish priest may often proceed with a marriage of this kind, if it is a question legitimating a child already born, or shortly expected ; if it is a matter of preventing or putting an end to the scandal of an unlawful cohabitation, or of a civil marriage ; or if the interests of the properly disposed party, who cannot without grave inconvenience give up the marriage, require it.

b) infamous. 2. A second class of public sinners comprises those who, in theological language, are designated as being taxed with infamy (« *infames* »), such as excommunicated persons, freemasons, and those who have abjured the faith. With regard to them :

a/ The parish priest can never assist at the marriage of a person who is *publicly excommunicated* and *vitandus* (e. g., one excommunicated by name and denounced as such, or a notorious *percussor clericorum*) *except in a case of very great, not to say extreme, necessity* ; for the Church forbids communion with such in religious matters.

b/ As regards persons publicly excommunicated, but not *vitandi*, or those notoriously belonging to freemasonry or some similar sect (¹), the parish priest should refer *to the Bishop*. It is *for him to decide* in each particular case, according to the circumstances, and with a due regard for the evils that a refusal might entail, if he will permit the religious marriage to take place, and under what conditions and safeguards (²).

An answer from Rome, given in 1860, and a decree issued in 1883, require *the omission of the celebration of the Mass* (and

1. Cf. DE BRABANDERE-VAN COILLIE, o. c., n° 1457 and notably n° 1319, where he says that « socialism ought to be classed with societies of a masonic nature », since it is « a society that conspires against the Church and lawful authority » ; nevertheless those affiliated to any socialist group, no matter what, do not all lie under the censure contained in the Constitution *Apostolicæ Sedis*, and many among them do not incur this excommunication, because they are ignorant of the objects of socialism.

2. See the reply of the S. Penit., of 10 Dec. 1860 ; the decree of the C. S. O., of 21 Aug. 1861 ; the decree of the C. S. O., of 21 Feb. 1863 (in the *Collect. de Prop. Fide*, nos 1528, 1529, and 1534) ; and the decree of 28 June 1865, embodied in the decrees of the C. S. O. of 23 Apr. 1873 (*Collect.*, n° 1552) and of 30 Jan. 1867, ad 1^m ; this second decree is given in the decree of the C. S. O. of 25 May 1897 (*Collat. Brug.*, t. III, p. 350).

consequently of the *solemn* blessing also, which is given during the Mass), unless there are imperative reasons to the contrary. According to a decree of 1865, as quoted in the decree of 1873, *every ecclesiastical rite* is to be excluded ⁽¹⁾; but this text, as quoted in the decree of 1897, is no longer so categorical, and the whole question is left to the decision of the Bishop, at least, according to the decree of 1883, « until the Apostolic See shall have issued a general decree on the subject » ⁽²⁾.

c/ « If it is a question of a marriage between a Catholic and a (baptized) person *who has renounced the faith* (like most unbelievers and freethinkers of the present day, who only ask for a religious marriage out of deference to their brides), but who has not joined any false religion or heretical sect, the parish priest ought first of all to do his best to break off the engagement. If he cannot succeed in this, and has reason to fear that, if he refuses to assist at the marriage, there may be a grave scandal or other serious evil, *he must lay the matter before the Bishop*, who, making use of the faculty now granted to him ⁽³⁾, after due consideration of all the circumstances, will be able to permit the *passive* assistance of the parish priest as an authorized witness, *provided he is satisfied as to the Catholic education of the children and other like conditions* ». Decr. of the C. S. O. of 30 Jan. 1867, ad 1^m, given in the decr. of 1897, l. c.

1. See also the *Instructio* of the C. S. O. of 5 July 1878, addressed to the Ordinaries of the Empire of Brazil : « It can in no way be tolerated... that marriages contracted by freemasons should be celebrated with all the solemnity of the Catholic rite... But when the parish priest is quite unable to prevent such a marriage... recourse must be had to the Ordinary, who... will be able to permit the parish priest to assist at the marriage *passively*, i. e., *without the blessing and other ecclesiastical rite*, but merely as an authorized witness ». In the *Collect.*, no 1863.

2. In the *diocese of Bruges* the Mass is always forbidden, and the preliminary conditions imposed, especially as to the education of the children and the danger of perversion for the Catholic party.

3. To the amended question : « Are the words of the decree of the C. S. O., of Wednesday 30 Jan. 1867, ad 1 : ' The case must be laid before the Bishop, who, making use of the faculty that has now been granted to him ', applicable to all the Bishops » ?, a reply was given in 1899 : « Affirmatively, after audience with His Holiness ». *Anal. eccles.*, VII, p. 144.

What is
meant by pas-
sive assis-
tance.

According to the *Litt. Apost.* of Gregory XVI, 30 Apr. 1841 (*Collect.*, n° 1428), *passive assistance* is « material presence without any ecclesiastical rite » ; consequently the parish priest is forbidden to appear in any sacred vestment, and must be present, as they say, *in nigris*. He must omit all the ceremonies of the Roman Ritual, the words : *Ego vos conjungo...*, the blessing of the ring, the prayers and, a fortiori, the Mass and the nuptial blessing. Since the decree *Ne Temere*, however, it is not enough that he should merely hear the words of consent, he must also *personally ask and receive the consent of the contracting parties* ⁽¹⁾.

The conditions to be imposed, besides the Catholic education of all the children, are that the party, who has abandoned the Faith, should promise the Catholic party freedom in the practice of religion, and that the Catholic party should earnestly strive to bring about the conversion of the other party.

118.
Observations.

Note 1. If there is time for recourse to the Bishop, the parish priest should always consult him before refusing to assist at the marriage of those who are unworthy, even outside of the cases mentioned under b/ and c/. If the circumstances do not admit of delay, he will then act in accordance with the rules indicated.

2. In refusing the unworthy, the Bishop and the parish priest do not set up any matrimonial impediment : that is beyond their powers. The impediment, if the unworthiness of the subject ⁽²⁾ can be called such, is already in existence, and the Bishop and parish priest only shape their course accordingly.

Moreover, the Bishop and the parish priest (the latter only provisionally) are generally recognised as having the power to stop a marriage, even apart from the unworthiness of the subject, for a good and reasonable cause, e. g., to put an end to a scandal, and that as long as the cause exists ⁽³⁾.

1. See above, n° 64, and below, n° 257.

2. Strictly speaking, the impediment directly affects the marriage as a *contract*, and not as a sacrament. See below, n° 234.

3. See below, n° 221 and n° 244 ; cf. BENED. XIV, *De Syn. dioc.*, l. VIII, c. XIV, n° 5 ; GASPARRI, O. C., I, nos 199 ss. ; BANGEN, *Instr. Pract.*, II, nos 233 ss. ; DE BECKER, *De Matr.*, p. 392 ss.

3. As we have said above, parties who refuse to go to confession before marriage, cannot be considered, *by the very fact and by that alone*, as public sinners, and as such be denied the religious rites of marriage.

Nevertheless, *as a matter of fact*, it will rarely happen that, in such a case, the Bishop and parish priest will not have, on other grounds, some canonical reason for opposing the marriage, at least provisionally, and with due regard to the circumstances. For, such a refusal to go to confession will scarcely ever occur, except on the part of those who in other respects make a practice of neglecting their duties as Christians, and are consequently to be treated as public sinners.

ARTICLE 5. Ceremonies of the Sacrament of Marriage.

I. Rites actually in force.

We assume here the observance of the formalities required by the Decree *Ne Temere* for the validity of the contract; the further principal prescriptions are as follow:

1. According to common law:

The ceremonies of the *Roman Ritual* must be observed, Tit. VII, chap. 1 and 2, viz. the asking and giving the consent, blessing the nuptial ring and putting it on the finger; then, if desired, the celebration of the *Mass pro sponso et sponsa*, with the solemn benediction which it contains. Cf. *Collat. Brug.*, t. XIII, p. 384 s.

The *Mass pro sponso et sponsa* is a special *votive Mass*, contained in the Roman Missal; it begins with the introit: *Deus Israel*, and has proper prayers.

The solemn *nuptial blessing* is inserted in it; it consists of the prayers: *Propitiare Domine... Deus qui potestate...* to be said between the *Pater Noster* and the *Libera Nos*; and of the prayer: *Deus Abraham...*, to be recited before the *Placeat tibi S. Trinitas*.

The *Mass pro sponso et sponsa* and the above blessing must be omitted when the woman has already received it in a former marriage (¹), and also in the case of mixed marriages as we shall see farther on.

119.
*Rites of the
Sacrament.*

1. actual
rites:
a) by common
law,

1. The *Rit. Rom.*, tit. VII, chap. I, n° 15, says that the solemn blessing must

Outside these cases and the forbidden times, the marriage may always be blessed solemnly with Mass, even though the rubrics do not allow the *Nuptial Mass* ⁽¹⁾; the Mass of the day is then said with a commemoration from the nuptial Mass, and the blessing is given just as in that Mass.

The Church *earnestly desires* that all marriages that are not mixed marriages, and in which the bride has not formerly received the solemn blessing, should be blessed in this way, i. e. with Mass ⁽²⁾; for this blessing cannot be given without the Mass ⁽³⁾. For this reason, in case the priest cannot apply the Mass to the married couple themselves, because they pay no honorarium, the decree of the C.S.O., of Sept 1841, declares that the celebrant can take another intention, and that he satisfies his obligation by the Mass *pro sponso et sponsa*, unless he who gives the offering definitely desires another ⁽⁴⁾. The Holy See also desires that this blessing be given « to all those who did not receive it when they were married, no matter why, even if they ask for it after having been married a long time ». Moreover, it prescribes that « these same Catholic couples should be *exhorted* to ask for it, as soon as possible, if they have not received the nuptial blessing ». Decree of the C. S. O. Aug. 31st 1881 ⁽⁵⁾.

also be omitted in the case of the remarriage of a widower; it adds however, that « where the contrary custom exists, in the case of a widower marrying a young girl, it must be observed ». This question is now however (in all probability) settled by the Decree of the C. S. O., of the 31st of August 1881 (quoted in the *Coll. Brug.*, t. I, p. 97), which enjoins the giving of the solemn blessing, with the single exception: « provided that the *woman*, if she is a widow, has not already received it in a former marriage ». In any case, the custom exists, in our countries, of blessing the marriages of widowers with young girls, and consequently is rightly followed and should be adhered to.

1. As is the case (outside the forbidden times) for Sundays, Holydays of obligation, doubles of the 1st and 2nd class; also the whole octave of the Epiphany, the vigil and the whole octave of Pentecost, and the whole octave of the feast of Corpus Christi; in a word, all those days that exclude the offices of doubles of the 2nd class.

2. Consult *Collat. Brug.*, t. I, p. 98; A.A.S., I, p. 255, where the decree of the Holy See, Feb. 12th 1909, is cited.

3. See appendix for England.

4. *Collat. Brug.*, I, p. 101, and t. IV, p. 184 ss.

5. Cf. *Coll. Brug.*, t. I, p. 97 and 100, and also t. IV, p. 254 ss., and t. XII, p. 35 s.

2. Prescriptions of diocesan law (*diocese of Bruges*) :

120.
b) by diocesan
law (*diocese
of Bruges*).

We have observed that the ceremonies of the *Rit. Rom.* do not exclude particular rites ; the Ritual even says explicitly, that instead of the formula, *Ego conjungo*, other words may be used, « according to the rite observed in each province » ; and at the end it adds : « If there are provinces that have to-day other usages and laudable ceremonies for the celebration of marriage, the Holy Synod of Trent *desires* that they observe them ». In accordance with these ideas, different rites obtain in different dioceses. Thus, in the *diocese of Bruges*, the Bishop, by a decree dated Oct. 14, 1897, approved of certain introductory ceremonies to the celebration of the Mass, and ordered them to be observed, along with the prescriptions of the *Rit. Rom.* (1).

For example : before asking for the marriage consent, the priest sprinkles the betrothed couple with holy water, and explains to them the nature of the grace that they are about to receive, and the gravity of the obligation that they are about to undertake. For the giving of the consent, he not only tells the parties to give the right hand, but he puts the stole round the two hands, after which he asks for the consent according to the Ritual, keeping the formula : *Ego vos conjungo*. Then he removes the stole, sprinkles the couple with holy water, blesses and passes the ring, still according to the Ritual.

The service concludes with the ceremonies which the *Pastorale Brug.*, p. 132 s., formerly prescribed for the marriages of widows : « The husband ascends to the altar in a respectful manner, followed by his spouse ; he kisses the altar himself first and then his spouse kisses it, both then kneel on the top step, and the priest standing before them and facing them, recites the following prayer : *Let us pray : O Lord, turn thine eyes upon this union ; and as thou didst send thine holy angel the peaceful Raphael to Tobias and Sarah, daughter of Raguel, even so, O Lord, deign to grant thy protection to these thy servants here, that they may continue to accomplish thy will, may live and grow old in thy love, and may have a numerous and lasting posterity. Through Christ Our Lord. Amen.*

May the grace of Our Lord Jesus Christ, Divine charity and the outpouring of the Holy Ghost, be always with you. Amen (2).

Note. 1. As regards the place where the marriage should be celebrated, the *Rit. Rom.*, Tit. VII, chap. 1, n° 16, says : « It is above all proper to

121.
Remarks concerning the
place of celebration.

1. Cf. *Coll. Brug.*, t. I, p. 601 ss.

2. The *velatio capitis*, which consisted in placing the stole in the form of a cross on the heads of the parties, has been abolished ; likewise, the particular nuptial blessing which is given outside the Mass, and which, according to the *Past. Brug.*, p. 129 ss., was formerly in use for the marriages of young girls.

celebrate it *in the church* ». According to the *Pastorale Brug.*, p. 123, the disciplinary measures of which are still in force, « the marriage cannot be celebrated elsewhere than in the church, except in the case of grave necessity ⁽¹⁾, which must be left to the decision of the Ordinary, unless there be danger of death ».

This necessity may arise from different causes, e. g. from the inability of one of the parties to go to the church ⁽²⁾, or from the necessity of secretly re-establishing a marriage invalid through occult crime. There is evidently an imperative reason for celebrating the marriage at home, when there is question of the marriage of a dying person *in extremis*, as we have said ; for the rest, in this case, other and different special prescriptions must still be observed, which will be made known in the course of this treatise, especially in n° 401.

Marriage by
Proxy.

2. As regards marriage *by proxy* or *by letter*, no special ceremony is required ; it is however evidently to be observed, as we have said above, in nos 62, 70 and 100, that the formalities must be carried out which arise either from natural or positive law, for the validity of the consent given in this manner.

Let us here recall, in accordance with what we said in n° 119, the duty of counselling the parties to seek the nuptial blessing on the first opportunity.

II. Ancient rites ⁽³⁾.

122.
2. Ancient
rites.

In former times, was first celebrated the *betrothal* ; this was generally

1. Save also, as is clear, the cases in which the Church forbids the celebration of the marriages in the church, as for example, mixed marriages, and those of certain sinners, called in canonical language infamous (*infames*), according to the rules given in n° 117.

2. This impossibility occurred twice in the diocese of Bruges, in the one year 1902.

3. The rites described here are those that are found in various medieval rituals and ordinals, especially in France, England and Germany.

Originally, in many places, marriage was contracted by the consent of the parties mutually given in the presence of the parents, relations and friends, with or without the presence of the priest ; thereafter was added, as a distinct ceremony, the *solemnization* of the marriage, with various religious rites, especially that of attendance at the church and at Mass (*Kirchgang*, as it was called), with, in the course of time, the special nuptial blessing. Cf. FRIEDBERG, *Das Recht.*, p. 8 s.; HOWARD, O. C., I, p. 291-308 ; LICHTENBERGER, O. C., p. 54 s.; SOHM, *Das Recht*, p. 158.

At a later date, probably under the influence of the fact that the regulation of marriage had passed into the hands of the Church, the giving of consent also took place with religious rites at the door of the church, and with it was intimately connected the solemnization of the marriage by

contracted before the church, in presence of the priest and three or four witnesses ; the ring and contract money ⁽¹⁾ were exchanged, and the promise of future marriage was entered in the matrimonial register. Later on, the marriage was solemnized :

1. *The betrothed were presented to either the assistant or the parish priest* by their parents, or their guardians, or the bridesman ⁽²⁾ ; *this presentation of the betrothed*, with the different ceremonies that followed it, and the giving of the consent, took place before *the outer door* of the church ⁽³⁾ : hence the expression : *to be married before the church* ⁽⁴⁾.

2. *The right hands of the betrothed were joined*, and in this position they exchanged their vows. *The joining of the right hands*, which was also the custom among the Romans ⁽⁵⁾, was done by the priest, who put the right

means of the *Kirchgang* and accompanying ceremonies, as will be presently described. This was not, however, universally in use ; thus at Courtrai, in Flanders, according to a document of 1512, the solemnization of the marriage, took place on the Sunday following, on which day « ad officium infra maioris missae solemnia venire debebant (nupti) oblationes suas ibidem facturi et matrimonium hujusmodi solemnizaturi ; vel si omiserint, debebant... summam aliquam solvere nomine redemptionis ».

1. The *Subarrhatio* consisted in the gift of a ring from the man to his future wife (sometimes the gift was reciprocal), as a pledge or earnest of his plighted troth. Sometimes other presents were added for the same reason. See above, under n° 15.

2. This office of *paranymphus* seems to have succeeded to that of the *pronuba* of the ancient Romans. See GLASSON, o. c., p. 171. Among the Germans the paranymphs were called *Brautführer* or *Fürsprecher*. See n° 83, and SOHM, *Das Recht*, p. 71 s. and 166 s.

3. Hence the usage, in certain places, of the *Brauttüren*, or *Ehetüren*, i. e. of the nuptial doors, placed at the entrance of the church ; these doors were decorated with the images of the wise and foolish virgins, awaiting the Divine Spouse. Cf. *Der Katholik*, t. XXXII (1905), p. 157 ; FALK, o. c., p. 3. s. These doors are still to be found in the cathedrals of Basle, of Berne and of Strasbourg, and in several other churches. « Bekannt ist vor allen, as Falk says, die St-Sebalduskirche zu Nürnberg mit ihrer Brauttür : im innern der segnende Heiland über Adam und Eva, im Gewände die klugen und törichten Jungfrauen, aussen, in grösseren Figuren, Maria und St-Sebald ».

4. In celebrating the marriage before the *doors of the church*, it is intended that its celebration should be before God (therefore marriage is contracted before the House of God and His minister), and before the people and the Christian community (and therefore an eminently public place is chosen). This is expressed in the form used in the *Salisbury Manual*, p. 50 : « ante ostium ecclesiae, coram Deo, sacerdote et populo » ; likewise in the *York Manual*, p. 24, and the *Sarum Manual*, p. 17.

5. GLASSON, o. c., p. 168 and 171.

hand of the bridegroom into that of his future wife, and in certain places covered them with his stole ⁽¹⁾, or even enveloped them in the right-hand extremity of the stole ⁽²⁾, the hands of young girls being ungloved, while those of widows were gloved ⁽³⁾. Before the joining of the hands, the betrothed were asked whether they wished to take each the other for husband and wife respectively.

3. *The nuptial consent* was asked and received by the priest who handed over the wife to the husband (or also the husband to the wife). The betrothed used as pledge, different formulas, which were pretty well as follows : e. g. the priest said : « John, do you promise and swear to her that your goods you will loyally share with her, that for better or worse you will not abandon her, and that faith and loyalty as regards your body and your goods you will maintain with her, and that well or ill, all the days of your life and hers you will guard her ? — Sire, yes » ; and the same for the woman.

See MARTÈNE, o. c., p. 633, who gives also several other formulas ⁽⁴⁾. Sometimes also the priest said to the bridegroom : « Say after me : N. in the name of our Lord, I take thee for my wife and spouse according to the ordinances of God and of the holy Church, according to which I am bound to love thee as myself ; I am bound to keep faith and loyalty to thee, and to aid and comfort thee in thy necessities : which things, and all that husband should do for his wife, I promise to do and to maintain

1. *Ordo Remensis*, in MARTÈNE, o. c., L. I, P. 2^{da}, p. 644. The custom of joining the hands of the parties (*Mädchen fesseln*) was already in vogue among the ancient Germans. V. Roche, o. c., p. 74.

2. *Ordo Leodiensis*, l. c., p. 646.

3. MARTÈNE, o. c., p. 608 and 620 ; *Salisbury Manual*, p. 56 ; *York Manual*, p. 26.

4. For example, here is one on p. 633. « John, will you have this woman whose name by baptism is Mary, for your wife and spouse ? — Sire, yes. — Mary, will you have this man whose name by baptism is John, for your husband and spouse ? — Sire, yes. — John, I give you Mary ; Mary, I give you John ». Similar forms may be seen in the *Salisbury Manual*, p. 55 s. ; the *York Manual*, p. 26 s. ; and the *Sarum Manual*, p. 19*. These words, and the joining of the hands of the bride and bridegroom, performed by the priest, signify that these receive their union of hands from God, through the medium of the priest, as remarks PROBST, *Sacramente*, p. 457 : « Es Liegt nicht nur im christlichen Geiste, dass der Mann seine Frau von Gott erbittet, und dass sie ihm daher der Priester, als Stellvertreter Gottes, übergab, sondern es erhält damit auch die Bemerkung Tertullians, wie Kinder sich nicht ohne Zustimmung der Vater verehelichen, so Christen nicht ohne Zustimmung des himmlischen Vaters, ihre volle Bedeutung ». In the old English rituals, the bride was given to the bridegroom by her father or by her friends, or by a friend or guardian, or even by the priest and guardian. Cf. *Salisbury Manual*, p. 56 ; *York Manual*, p. 26 s. ; *Sarum Manual* p. 19 (cf. *ibid.*, p. 116).

by the faith and vow of my body ». And the same for the woman. See MARTÈNE, l. c., p. 654, compared with p. 646, where is given the formula formerly in use in the diocese of Liège. See also OPET, o. c., p. 97 ss. : he makes out that the custom of asking and receiving the consent of the parties has been taken up by the Church from ancient Germanic customs.

4. *The blessing and putting on of the ring.*

After that, the priest proceeded to the blessing and putting on of the nuptial ring ; after having blessed it, he gave it to the bridegroom, who from the hand of the priest, passed it to the hand of the bride.

In former times the ring was put on the ring finger of the *left hand* ⁽¹⁾, to signify the union of hearts, according to YVES DE CHARTRES, *Panormia*, VI, ch. 8 : for, as he says, « in this finger there is a vein (called *vena amoris*), so they say, which extends to the heart » ⁽²⁾. But, according to most of the *Ordines*, quoted by MARTÈNE, the ring should be placed on the third finger of the *right hand*, passing it first on the thumb, while the bridegroom said to the bride : « In the name of the Father », then on the index finger, saying : « and of the Son », then on the middle finger, adding : « and of the Holy Ghost » ⁽³⁾ ; the bridegroom further saying : « With this ring I thee wed, and with my body I thee honour, and with this silver I thee endow ⁽⁴⁾. In the name of the Father etc. » ⁽⁵⁾.

1. This is still actually stated by the *Rit. Rom.* ; but the *Pastorale Brug.* indicated the ring finger of the *right hand*.

2. *Migne*, CXXI, col. 1254. Cf. FRIEDBERG, *Das Recht*, p. 29, in a note ; HOWARD, o. c., I, p. 384 ; *Salisbury Manual*, p. 59 ; *York Manual*, p. 27 ; *Sarum Manual*, p. 20*. Another reason is given in the *Pontifical* of the monastery of Lyre : « the ring should be put on the *left hand* to mark the difference between the dignity of married persons and Bishops, who should publicly wear the ring on the right hand as a sign of full and complete chastity ».

3. In the *Salisbury Manual*, p. 58 ; *York Manual*, p. 27 ; *Sarum Manual*, p. 19* and *Hereford Manual*, p. 117, after the putting of the ring on the third finger with the words *et Spiritus Sancti*, the ring is to be put on the fourth finger, (quem dicunt medicum), with the word *Amen*, and it is added : « ibique dimittat anulum ».

4. Formerly, here and there, in various countries, a sum of money was handed by the bridegroom to the bride ; this was derived from the primitive practice of giving a marriage price to the parents of the bride (cf. *supra*, n° 52) ; this marriage price subsequently remained in use under the form of the payment of a *solidum et denarium* (cf. *ibid.*), and afterwards under the form of the payment of 13 pieces of silver. Under this form, the practice is still in force in Spain (e.g., on the occasion of the marriage of King Alfonso XIII, in 1906), and in some parts of France. The number of 13 pieces of silver corresponds with the *solidum* (which was of gold, and was equivalent to 12 denarii) and a silver denarius. Cf. THURSTON, in the *Catholic Encyclop.*, under *Marriage*, IX, p. 706.

5. Cap. 7, C. XXX, qu. 5, also mentions as a marriage ceremony that the

5. After some prayers recited over the parties, *they were introduced into the church*, holding in their hands lighted candles, and they assisted at the sacrifice of the Mass ⁽¹⁾.

6. During the Mass ⁽²⁾, before the *Pax Domini*, *they were solemnly blessed*, and during the blessing, or even before it, they prostrated in prayer, and were covered with a veil or pall ⁽³⁾, which four men held at the four corners ⁽⁴⁾.

bride and bridegroom are joined together with a fillet, as by a single bond, for this purpose that they may not break the connection of conjugal unity ; and that this fillet « candido purpureoque colore permiscetur : candor quippe ad munditiam vitae, purpura ad sanguinis posteritatem adhibetur ; ut hoc signo et continentiae lex tenenda ab utrisque ad tempus admoneatur, et post hoc reddendum debitum non negetur ».

1. Formerly it was the *community* Mass that they heard ; the custom was introduced later of celebrating a *special* Mass for them ; this is met with already in the Gelasian Sacramentary. See FRIEDBERG, *Das Recht*, p. 8 s.; HOWARD, o. c., I, p. 296. In the *York Manual*, p. 29, it is said that the Mass is to be *de Trinitate*.

2. With regard to the incensation made during Mass, the *Salisbury Manual* makes a curious observation, p. 67, « quod ordo (odor) thuris benedicti nunquam datur in ecclesia sponso et sponsae ; inde est quod, oblato thure benedicto super altare, si descendat thuribulus ad clericos vel ad laicos, aliud thus (non benedictum) est apponendum et hominibus offerendum ». Cf. also the *Surum Manual*, p. 22*.

3. The *velatio nuptialis* seems to have been practised in two ways. The *first* consisted in *veiling* the head of the bride, after the manner in which *fiancées* took the veil *in sign of modesty* (S. AMBROSE, *De Abraham*, l. I, ch. 9, Migne, XIV, col. 454). The *other* consisted in *extending the pall* over the married couple ; this was the symbol of the conjugal bed and its covering, as KÖGLER well shows, o. c., p. 48. This author remarks that this symbol, already in use among the Hebrews (*Ruth*, III, 9 ; *Ezech.*, VI, 8), agreed perfectly with the blessing given to the married couple, and the prayer which asked for them fruitfulness, which blessing and prayer took place during the rite of the *velatio* : this symbolic signification of the nuptial bed will find its confirmation further on, in n° 169, where we shall unfold the rite to be followed in legitimating a child born before marriage.

The *first* manner is, it would seem, the more ancient ; it was practised in the celebration of marriage, and also in the consecration of virgins to God, to mark in the latter case their virginal chastity and their spiritual marriage. This latter symbol is often referred to by the Fathers, especially ST. AMBROSE (*De Lapsu virginis consecratae*, ch. 5, Migne, XVI, col. 372 s.) and by ancient inscriptions, as for instance, that of the catacombs of St. Priscilla : « *to be wedded to God by the holy veils* ». The *other way*, viz. the extended pall, seems to have been introduced later ; it was especially in use in our countries during the Middle Ages.

This *velatio* and this *blessing* took place only at first marriages ; those who were married again were deprived of them: for the Church looked with no favour on second marriages, regarding them as less perfect, and less representative of the singular union of Christ with the Church, His sole spouse (1). The blessing was omitted whenever it was a case of a second marriage for either of the parties (2) ; the blessing then was refused, and

This rite was also adopted in the ceremonies for the consecration of virgins, to symbolise their spiritual marriage with Christ ; this idea of the spiritual marriage appears again in the ring that is put on their finger, and the crown that is put on their head, ceremonies also borrowed from the rites of marriage. They are wrong, then, who take the ceremony of the pall in a religious profession, as a symbol of death to the world (cf. also THURSTON, l. c., p. 707). Traces of the *velatio* in the second way are perhaps also to be found, in the rite formerly prescribed by the *Pastorale Brug.*, according to which, the priest had to put the stole in the form of a cross upon the heads of the married couple.

4. According to the *Salisbury Manual*, p. 68, *pallium* « teneant quatuor clerici ad quatuor cornua, in superpelliceis » ; the *pallium* is to be extended, and the bridegroom and bride are to kneel under it from the beginning of the canon, after the *Sanctus*. Cf. also the *Sarum Manual*, p. 22*.

1. The English rituals restrict the prohibition against repeating the blessing in the case of second marriages solely to the words (in the prayer *Deus qui potestate virtutis*) : « Deus qui tam excellenti mysterio conjugalem copulam consecrasti, ut Christi et Ecclesiae sacramentum consecrasses in toedere nuptiarum » ; because, as they argue, in that form of blessing precisely « agitur de unitate Christi et Ecclesiae, quae figuratur in primo matrimonio, non autem in secundo ». Thus the *Salisbury Manual*, p. 71 s., compared with the *York Manual*, p. 35, and the *Sarum Manual*, p. 23*.

They also limit the said prohibition to the case in which the blessing was actually given in the former marriage, and they do not forbid the blessing of a widower or widow not yet blessed. This is in conformity with c. 3, X, IV, 21 : « the man and the woman who contract second marriages ought not to receive the blessing of the priest ; as they have been already blessed once, this blessing should not be repeated ». Hence it appears that the here invoked reason of refusing the blessing is the reverence due to the blessing already given. Thus the *Glossa Ordinaria* à propos of this adds, in reference to the word *Iterari*, that to have given the blessing would have seemed to say, « that this sacrament had not as yet been conferred, at least in an absolutely efficacious way ; which would have been injurious to it » (Cf. GILLMANN, *Die Siebenzahl der Sacramente bei den Glossatoren des Gratianischen Dekrets*, Mainz, 1909, p. 30, note 4 ; *Der Katholik*, 1909, II, p. 207, note 2).

2. That the previous blessing of one or the other party sufficed for the refusal of the blessing of both, is, according to *Hostiensis* to be found in this : « per carnem aliàs benedictam, caro non benedicta, cum qua jungitur, benedicitur ; in commixtione enim corporum, per quam efficiuntur una caro vir et mulier, caro

likewise the *velatio* that accompanied it. Later on, the custom was introduced in some places, of giving the blessing and the *velatio* to widowers who married a young girl, but not to widows who married again; the reason being that the prayers of the blessing and the *velatio* referred specially to the woman ⁽¹⁾.

7. Then the bridegroom *received* the *pax* from the celebrant, and gave it to his wife, but neither, he nor she, gave it to any other, as the Rituals prescribe; the *Salisbury Manual*, p. 74, adds: « sed statim diaconus vel clericus a presbytero pacem accipiens, ferat aliis sicut solitum est ».

8. The Mass finished, then was the moment for the *exhortation* which the priest had to give on the subject of chastity to be observed in marriage, and in particular on the subject of continence to be practised on the first and even second and third night after the wedding. Then the couple left the church *wearing crowns on their heads*: this custom had a special import among the Greeks, and again it was followed only in first marriages, as MARTÈNE declares at some length, o. c., p. 609 ⁽²⁾. Cf. PROBST, *Die ältesten Römischen Sacramentarien*, p. 130 s.; CHARDON, o. c. p. 156 ss. and 156 ss. ⁽³⁾.

9. It was an ancient custom in many places, for the priest to conduct the married couple to their dwelling. Arrived there, *he blessed the bread and wine* and tasted it first; he also *blessed the bedroom* and the newly-married

benedicta trahit ad se carnem non benedictam, sicut oleum sanctum trahit ad se oleum admixtum non sanctum, et sic totum fit sanctum ». Thus the *York Manual*, p. 36.

1. Cf. *Glossa ordinaria*, l. c.; MARTÈNE, l. I, P. 2, c. IX, art. 1, n° 7. The *Salisbury Manual*, p. 73 s., vindicates this latter practice thus: « Salvatur et aliquo modo significatio in ordine ad primas nuptias, quia Episcopus, etsi unam Ecclesiam habeat sponsam, habet tamen plures personas desponsatas in una Ecclesia; sed anima non potest esse sponsa alterius quam Christi, quia cum daemone fornicatur, nec est matrimonium spirituale: et propter hoc, quando *mulier* secundo nubit, nuptiae non benedicuntur propter defectum sacramenti ». The other Rituals mentioned above speak in like terms.

2. This author notes that the custom of not crowning those who married again, was abolished as time went on, and that crowns were worn even in second marriages; only, if one of the contracting parties happened to be celibate, and the other widowed, the former wore the crown on the head, and the latter on the shoulder. MARTÈNE quotes in this connection the words of Theodore Studita, who rails bitterness at this practice: « Where at length will they put the crown on one who marries a third time? On the hand or on the knee, since they crown the shoulder of the widow who marries a second time? »

3. It must be noticed, according to St. Chrysostom, that the crown was a symbol of victory won over the flesh, « weil sie (betrothed virgins) von der bösen Lust nicht überwunden zum Brautgemache schritten ».

couple sitting or lying on the bed, as attest the Rituals quoted by MARTÈNE, p. 635 and 637, and in several other places (1).

After having first tasted the blessed bread and wine, he handed them to the bridegroom, who in his turn tasted them, and then passed them on to the bride, whilst the priest addressed to him the following words, or something similar : « Peter, take and give to your wife, giving her good part and loyalty that you would have her give to you » (2).

Note 1. We may here quote the purport of the *rescript of Nicholas I, in reply to consultations addressed to him from Bulgaria* (866), at least as far as concerns the rites of betrothals and marriages ; almost all the ceremonies enumerated above are mentioned in it : « *After the betrothal, which is a promise of future marriage, made with the consent of the contracting parties and of those who have authority over them; after the future husband has given the earnest-money to his future wife, betrothing himself to her by putting the ring on her faith-finger ; after he has given to her the dowry agreed upon and the deed which gives her legal claim to it, and all this in the presence of the friends of both parties : then, soon, or at a convenient time.... they are both conducted to the wedding.*

And first of all, they are led to the church of our Lord, bearing the offerings they are to make to God by the hands of the priest, and thus they receive finally the blessing and the heavenly veil.... He however who con-

1. This blessing of the bed-chamber and the bed, and of the married persons themselves, a blessing wick from the XI century was in use in our countries, is probably related to the ancient copulatheoria, as we have pointed out in no 60 ; it was also given against witchcraft, which was then believed to be very common, as we have already observed above, no 136, in a note. On this subject, see MARTÈNE, o. c., and FRANZ, o. c., p. 178 ss.

2. Cf. MARTÈNE, o. c., p. 639, compared with p. 635, 636 and 642 ; see also DE MOLÉON, o. c., p. 621. This was done on entering the house to symbolise the unity and intimacy which were henceforth to exist between the wedded couple ; but in other places a similar ceremony, over and above this, took place in the church, towards the end of the Mass. It is not improbable that this latter distribution of blessed bread and wine, may have been, by way of *eulogia*, a participation in the sacrifice of the Mass, i. e., a trace of the eucharistic communion, such as it seems formerly to have been. Cf. MARTÈNE, o. c., p. 610 ; CHARDON, o. c., p. 611 s. This explanation, which is confirmed by the text of several rituals, in which it is said that the priest gives the consecrated host, seems to us preferable to that of DE MOLÉON, l. c., and of BOCQUILLOT, o. c., p. 424 s., who see in this rite a trace of the *agape*. As to the rite of tasting the bread and wine, or the wine alone, as a mark of union, and the preservation of this practice in many parts of Germany, in Russia and in Greece, cf. FRANZ, o. c., I, p. 281-284 ; *Eccles. Review*, t. XLV (1911), p. 486 ss. and p. 728 s.

tracts a second marriage does not receive the veil. After that, they leave the church, wearing crowns on their heads, which crowns are always kept in the church according to custom » (1).

123.
Analogy with
the ceremonies
formerly
in use at
Rome.

2. If one considers, only for an instant, the ancient religious ceremonies described above, the *analogy* between them and the *ancient* matrimonial rites of the Romans is evident, especially in the celebration of marriages by *confarreation*. These pagan rites have been almost entirely adopted by the Church, which has added a Christian form and signification to them.

Thus, as we have already seen, with the Romans also the hands of the betrothed were united through the medium of the *pronuba*, for the giving of the consent ; the nuptial ring was put on, sacrifices were offered, which have been replaced by the sacrifice of the Mass (2) ; moreover it was customary for the future bride, during the time that preceded the marriage, to wear on her head a red veil (hence the term : *nubere*), and a crown of flowers (3). Even the prescription to celebrate the second marriages of widowers, and especially of widows, with less pomp, is to be found in Roman law. In fact « the solemnities of strict marriage were only observed in the case of marriage of a young girl ; they were not used for the marriages of widows, which were always looked upon with a certain amount of disfavour (4). » That is not all. The custom, which we have mentioned above, of conducting the married couple to their dwelling, and of blessing their bed-chamber, seems to be derived from the ancient nuptial procession of the Romans, a ceremony which occupied so important a place in their ancient law. Finally, as regards the custom of blessing the bread and wine, and the tasting it on the *deductio in domum*, one is inclined to think, that this also is a Christian adaptation of a similar rite in vogue among the Romans, on the occasion of the same procession (see above, n° 83), or an adaptation of the usage formerly observed in marriages by *confarreation*, during the celebration of which the newly-wedded couple partook of a loaf of bread, in sign of union and common life ; unless one prefers to say that this usage has been borrowed from the practices of the

1. See c. 3, C. XXX, 5.

2. « It is interesting to verify the fact that the nuptial ritual described by Pope Nicholas, is no other than the ritual of the ancient Romans, minus the sacrifice, or rather with the substitution of the Mass for the idolatrous sacrifice ». DUCHESNE, O. C., p. 433 ; collato THURSTON, I. C., p. 704.

3. See DARENBERG ET SAGLIO, O. C., V° *Matrimonium*, III², p. 1655 ; GLASSON, O. C., p. 169 ; and above, n° 83.

4. DARENBERG ET SAGLIO, I. C., p. 1654 s. ; GLASSON, O. C., p. 168, compared with SEHLING, *Die Unterscheidung*, p. 7 ; see also above, under n° 83.

Germans ; but whatever may be the origin of the ceremony, its signification is the same ⁽¹⁾.

SECTION III

THE MARRIAGE BOND

This section is divided into three chapters : the first treats of the *nature* of the marriage bond ; the second of its *effects* ; the third of its *attributes*, to wit, unity and indissolubility.

CHAPTER I.

NATURE OF THE MARRIAGE BOND.

124.
Division.

The marriage bond, as we have already said above, is a moral bond which the contract of marriage establishes between married persons, and which unites them in a union so strict that they form but one single principle in the procreation and education of children. That which constitutes this bond, which forms its strands, are *the different rights and duties* of those who are bound by it. In the first place, rights and duties that are *mutual* ; married people are in fact obliged : a/ to the conjugal duty ⁽²⁾ ; b/ to cohabitation ; c/ to mutual love and support under the direction of the husband. Next come rights and duties in respect of the *children* : education and training.

ARTICLE I. The conjugal duty.

Two paragraphs : the first showing the lawfulness of the sexual act between married persons ; the second delimiting their rights and duties on this head.

1. In DARENBERG ET SAGLIO, l. c., p. 1657, there is given a representation of a Roman marriage which seems to indicate that the *pallium* was extended over the bride and bridegroom during the ceremony.

2. The apostle St. Paul constantly uses the expression : *conjugal duty*, to designate in a more becoming way the *copula carnalis*, the sexual intercourse between married persons, an intercourse which constitutes, as we shall see, one of the primary obligations of marriage.

PARAGRAPH I. LAWFULNESS OF THE SEXUAL ACT BETWEEN MARRIED PERSONS.

FIRST PROPOSITION. *Objectively speaking, sexual relations, supposing them apt for the purposes of generation, are of their nature lawful between married persons, and between them only.*

125.

Between married persons, sexual relations of their nature apt for generation, are lawful.

Proofs and explanations.

Major. Every action, considered in itself, is lawful, as long as it remains of *its nature, directed to its proper end.*

Minor. But, *between married persons*, all the relations which are of *their nature apt for generation*, fulfil this condition, *to the exclusion of others.* Therefore.

The major of this syllogism is clear. As *St. Thomas* teaches (2^a 2^{ae}, qu. 153, art. 2): « What constitutes sin in human acts, is precisely that these acts are contrary to the order of human reason. Now, it is proper to human reason to direct each thing in a fitting manner towards its end ». It suffices however, for the lawfulness of the act, that it should be, *of its nature*, ordained towards its end, or, in scholastic language : *per se*. For, « it is not that which may happen *per accidens* in a given case, which furnishes the measure of good and evil in human acts. It is the genus, the nature itself of the act, which we must consider in its entirety » (1).

To proceed to the **minor**.

1. *The end towards which the sexual act tends*, is evidently the propagation of the species. This act, considered in itself, *has no other end*. Others assign to it, it is true, other ends besides, notably the appeasement of passion. But, strictly speaking, that is not the end towards which the act of the flesh tends, much rather is it the means to attain that end. Beyond its proper end : the end of procreation, there can only be question of ends improperly so called, and altogether subordinate to the true end (2).

And in fact, what does the very difference between the sexes, and the respective disposition of the genital organs imply ; what is the signification, in this matter, of the analogy with the animals, unless it be that sexual relations have but one proper, one single end : the propagation of the species ?

1. *C. Gent.*, 1. III, chap. 122.

2. See above, under nos 53 and the following.

And does not common sense itself testify to this truth (?) ? The appeasing of passion is certainly not the proper end of the work of the flesh. In fact, passion, which is no other than the desire of sensual pleasure, is enkindled in man precisely to impel him to the act which brings with it that desired pleasure. Passion is, then, a means designed by the Creator to ensure the act, and thereby to attain the end. How then could this end be to appease the senses ? No, the end is quite another thing : it is the propagation of life and the education of children. Sensual pleasure and the appeasing of the senses are here only means, as we have said under n° 53, à propos of the marriage itself.

2. The sexual act then must be ordained towards its end : the propagation of the species. Let us consider for a moment this end. The propagation of the species implies not only *generation*, and in consequence, relations of *their nature compatible with fertilisation* ; but besides that, *education*, as we have already asserted above, n° 49. For that reason also it is necessary that man and woman should be *united by the conjugal bond* : in fact the education of the

1. ST. THOMAS (2^a 2^e, qu. 153, art. 2) speaks in the same sense : « As the pleasures of the table are destined to the preservation of the life of the individual, so sexual pleasures are destined to preserve the life of the species... Consequently : as the former pleasures may be lawful, if they are taken in moderation so as to be salutary to the body, so the latter may be lawful, if they are taken in moderation according to the prescribed order, so as to procure the propagation of the species ».

See also C. Gentes, l. III, chap. 122 : « The emission of the seed should have in view generation, which is the *purpose of the intercourse between the sexes*. But it is not enough to beget the child ; it must be nourished, failing which, it dies. That is the reason why the emission of the seed should tend, of its nature, towards the generation and education of the child ». And further on, chap. 123 : « Alone, of all natural acts, generation tends to the good of the species ; nutrition... concerns the individual, but generation preserves the species itself ». And finally, in chap. 126 : « It is in the order of things that the sexual act should be performed in the interests of the begetting and the education of children ».

For numerous other testimonies in the same sense, we refer our readers to the *Collat. Brug.*, t. VI, p. 472 and the following, t. VII, p. 476 and the following ; to ESMEIN, o. c., I, p. 241 and 249, and the following ; to the *Anal. Eccl.*, 1903, p. 231 and the following ; to SEHLING, *Die Unterscheidung*, p. 7 and 17. For the contrary opinion, see TREUB, o. c., p. 36, who brings forward the quotation from Dr. Pierson : « The beautiful union of man and woman may be a source of new life ; it may also not be : it has its reason for existence in itself ».

children requires, of itself, the cooperation and the protracted cares of the father and mother, and this can only be obtained, naturally and as a general rule, by the mutual obligation of the parents to a common life. There are many cases, it is true, where the work of education could be ensured outside of marriage : as is the case with rich and well-disposed parents. But, then it is chance and not the nature of things, which brings this about ; this case is, as they say, *per accidens* ; and it is the same in the inverse case, when the father and mother find it impossible to bring up their children properly, owing to their poverty.

We may therefore look upon our first proposition as proved. Objectively speaking, all sexual relations, *intrinsically apt for generation*, are of their nature lawful *between married persons* and between them *only* ⁽¹⁾.

Let us here examine our view more closely. What do we mean by relations *intrinsically apt for generation* ? When are the relations between married people normal ? They are such when the *act itself* tends *of its nature* to generation.

The act itself, we say : we need not, then, concern ourselves with the organs further required by the woman for fertilisation, but only with those that are indispensable for rendering the relations complete ⁽²⁾. This act should tend to procreation *of its nature*, i. e. in the light of the manner in which it is performed, and, once more, without attaching any importance to accidental circumstances, and to those peculiar to individuals, which may render the act itself unfruitful ⁽³⁾.

1. We intend here only the *essential* lawfulness of the normal relations between married persons, without speaking of the *accidental* malice which may sometimes supervene, by reason of certain circumstances. See later, n° 134.

2. For this reason, conjugal relations are forbidden to eunuchs. They are logically driven to admit the contrary, who hold the view that the appeasing of passion is one of the ends of the sexual act, and an end not subordinate to that of generation. In fact, in the case of the eunuch, the relations are possible ; and although they are intrinsically barren, and incapable of inducing fertilisation, they can perfectly appease the senses. See on this point, n° 54.

3. « The natural morality of human acts must not be measured by the standard of the accidental circumstances which accompany them in such or such a case ; it depends upon the nature of the act itself, taken by itself ». S. THOMAS, *C. Gent.*, I. III, n° 122.

SECOND PROPOSITION. *Considering the sexual act no longer in itself and objectively, but with reference to the married persons (¹) themselves, it is necessary in order that the act may be lawful, that these should have the intention of conforming to the end of procreation, at least negatively.*

Explanation and proof (²).

1. They commit a *positive fault*, who, in their marriage relations, *positively exclude* from their intention the natural end of the intercourse between the sexes, and avoid it as a mediate end as well as an immediate one.

That this *positive exclusion of the proper end* (³) constitutes a real fault, is abundantly shown by all that we have said above. Nevertheless, this fault will be but a *light one*, when the act itself is properly performed, unless, of course, the parties direct their intention to the particular purpose they have in view, as to their ultimate end (⁴).

2. That the conjugal relations between married persons may be *perfect*, they must have *the explicit intention of procreation, for their proper and principal end*. Then only does the end of the act perfectly coincide with the end of the agents. This act will not be less perfect, if it is accompanied by sensible pleasure, even though the parties have this pleasure in view, and seek it as a secondary end.

3. For the sexual act to be *simply lawful*, it suffices that it should be performed for any worthy purpose whatsoever, so long as its

126.
As regards
the persons,
the relations
are lawful, so
long as the
end of pro-
creation is not
positively
excluded.

1. We consider here the *subjective* side of these relations, only from the point of view of their conformity with the objective end of generation ; later, under n° 135 ss., we shall speak of other subjective circumstances which may vitiate the conjugal act, prescinding from the end pursued.

2. For further proof and explanation, see above, under n° 54.

3. It is one thing : *positively to exclude generation*, and another : *to desire* that it should not ensue. It is another thing again : *to perform* an act while removing the end, or *to abstain from it* to avoid that end. There is fault only, when the act is performed with the intention of positively excluding its natural end.

4. If in an act, the definite value of an ultimate end is attributed to a particular end in view, to which the agent, in consequence, directs his intention, it is clear that a grave fault is committed. See *Collat. Brug.*, t. X, p. 432 ss., V, p. 171.

proper end is not *positively* excluded. Every positive act of the will implying exclusion is forbidden ; but it is not forbidden simply *to prescind* from the end of procreation.

In fact, so long as there is only abstraction and not *positive* exclusion, it cannot be said that the parties act in positive defiance of the order ordained by God, or that they turn aside the sexual act from its end, or that they confine themselves to enjoyment considered as an end in itself. The proper end of the act remains intact, and they in no wise exclude it ; but they are not arrested by it ; they do not consider it. This is not forbidden ; the more so, that by not excluding procreation, they admit it, at least *implicitly*, and cause the conjugal relations to converge towards it. Further, according to the teaching of the SALMANTIC. (o. c., Treatise IX, Chap. III, point 3, n° 24) : « each time that in the matrimonial contract (or the sexual act), abstraction is made from the proper end of marriage, because the parties have not thought of it, or do not care about it, without, however, positively excluding it, the contract (or the act) remains directed towards its end. In fact, the parties, by not excluding it, admit it *implicitly*, and pursue the intrinsic end of the act, without thinking of it, by the very fact that they perform it. Thus it is that, although the marriage or the conjugal duty be sought for other motives, their proper end is none the less safeguarded ». Cf. also BALLERINI-PALMIERI, o. c., VI, n°s 551 and 552.

For the same reason BOUQUILLON says (*Theol. mor. fund.*, 2nd ed., 1890, n° 356) : that if anyone performs an act, having in view an intermediate and a subordinate end, *prescinding* from its ultimate end and abstaining from referring the action to it, he does not thereby do evil ; rather, does he implicitly cause his act to tend towards that end.

The acts in question are therefore licit, but do not attain all the perfection of which they are capable ; in the same sense, the SALMANTIC., l. c., n° 33, assert « that it is lawful to take moderate nourishment, even though one eats simply for pleasure, without thinking of the proper end of the act, but at the same time, without (positively) excluding it ». See also BOUQUILLON, o. c., n° 355 (1).

1. « To seek the pleasure proper to an act, is not equivalent absolutely, in

Corollary. Those relations are licit, although less perfect, that have in view appeasement *only* of the senses, or sensible pleasure *only*, *prescinding from* every other end. They are licit, we say, objectively and in themselves, for they are not opposed to any law or precept (¹). There is therefore no question of a fault being excused by the objective good faith of the parties, as is taught by AERTNYS, *Theol. Mor.*, II, n° 482 ; PRUNER, o. c., I, n° 875, and by others also.

We understand the proposition condemned by Innocent XI in an exclusive sense, and not in the sense of a simple abstraction (²).

THIRD PROPOSITION. Concerning carnal acts *not consummated, mutual or solitary* :

1. *Mutual excitations, provided they are not equivalent to pollution, are permissible between married persons. And if in certain cases they are intrinsic causes (causae per se) of pollution, they remain lawful, provided there is a grave and urgent motive for them, that there is no desire of pollution, and no danger of consenting to it.*

127.

The nature of such not consummated acts between married persons, and how far lawful.

2. *Solitary excitations are also lawful, so far as they have relation to the complete act, by way of preparation or completion ; without this relation, they constitute, in our opinion, grave sins, even when there is no danger of pollution.*

Explanation.

Ad 1^m. *Actus non consummati mutui* sponte sua ordinantur ad copulam ejusque censentur inchoationes : et sic mediate referun-

itself, to performing a bad act by reason of the end pursued. This way of acting is, on the contrary, entirely conformed to sound reason, provided that the will then follows a real good, and does not confine itself to the pleasure sought as to an end in itself. However, this point of view less noble, in actions otherwise quite regular, is an indication of a *rather low* moral standard, capable of being raised in the matter of the final outlook ». TH. MEYER : *Institutiones juris naturalis*, Friburgi-Brig., 1885, 1st P., n° 191.

1. See BALLERINI-PALMIERI, o. c., nos 551-591, against the *Vindices Alph.*, which teach, n° 841 : « that if anyone, in the acts in question (sexual act, acts of eating or drinking) seeks only pleasure, and neglects all other ends, without at the same time excluding them, he undoubtedly acts in a blameworthy manner, and commits a venial sin » ; that in order to be in fault, « it is not necessary to seek pleasure while excluding positively every other end..., but that it suffices to prescind from all other end ».

2. « Opus conjugii ob *solam* voluptatem exercitum omni penitus caret culpa ac defectu veniali ». DENZINGER, o. c., n° 1059.

tur ad finem generationis : supponuntur autem non esse tales actus qui æquivalenceant pollutioni, seu æquivalenter constituent pollutionis procurationem, cum eo ipso deficiat ordinatio ad copulam ⁽¹⁾.

Ex illa ordinatione intrinseca ad copulam accipiunt præfati actus objectivam suam legitimitatem *essentialem*, non tantum quando immediate præcedunt copulam instantem eamve comitantur, sed etiam aliter. Supponitur uti patet copula substantialiter legitima, i. e. supponitur eam posse exerceri modo de se generationi idoneo, ita ut ab hisce actibus non consummatis sint prohibendi (nisi opportune judicentur in bona fide relinquendi) conjuges, quorum alteruter, post matrimonium valide initum certam contraxerit impotentiam ⁽²⁾.

Porro, supposita objectiva legitimitate essentiali, possunt descripi actus consummati a/ vitiari *ex parte subjecti operantis*, et ex hoc capite potissimum attendenda est circumstantia *finis*, juxta dicta sub n. 126 : nempe si ad honestatem sufficit ut non excludant conjuges relationem ad copulam et ulterius ad finem generationis, incurritur inordinatio positiva, licet levis dumtaxat, ab illis qui *ideo a copula abinent ne proles generetur*.

Possunt iidem actus b/ accipere objectivam quamdam inordinationem *accidentalem* ex circumstantia afficiente ipsum opus. Plures sunt hujusmodi circumstantiæ, quarum inordinatio per causam proportionatam est abstergenda, ut omni ex parte liciti evadant actus illi.

Talis circumstantia est locus, tempus, et maxime id quod dicti actus sunt *causa per se vel per accidens pollutionis aut distillationis*. Si causa sunt *per se pollutionis*, sufficit quod ad illos urgeat *gravis* ratio. Hujusmodi ratio esset necessitas vitandi gravem infidelitatis suspicionem, vel speciale signum amoris præbendi, notando eo graviolem rationem requiri quo inhonestiores sunt actus admissi.

Quodsi actus inter conjuges admissi sunt causæ *per accidens* tantum pollutionis, quales sunt aspectus, tactus, oscula, amplexus,

1. Hujusmodi actus plerumque, licet non semper, erit copula ante seminationem abrupta, cohibita seminis effusione : de qua fusè disputavimus apud *Collat. Brug.*, t. VI, p. 477 s. et 473 ss. Cf. etiam infra, s. 147.

2. *Collat. Brug.*, t. VII, p. 478 s.

minus turpia vel obiter facta, non inducunt nisi *levem* inordinationem, levi de ratione abstergibilem : quæ ratio inter conjuges non deerit ⁽¹⁾. Item levis est inordinatio, pari modo abstergenda, quæ indicitur ex eo quod actus illi de se nati sunt provocare *distillationem* ⁽²⁾.

Juvat etiam notare in descriptis actibus *levem* posse incurri inordinationem ratione læsæ decentiæ naturalis, vel ratione exclusi finis operis in intentione operantis.

Ad 2^m. Quod spectat actus non consummatos **solitarios** :

a/ licent illi qui, pro adjunctis in quibus admittuntur, diriguntur ad copulam habendam vel copulam habitam perficiendam : et ita posset uxor frigidioris naturæ sese excitare tactibus solitariis, ad hoc ut perfecta excitatio venerea correspondeat momento seminationis virilis ⁽³⁾ ; posset etiam, si hanc perfectam veneream excitationem prævenerit seminatio viri, inchoatam excitationem perficere et hac ratione actum complere et integrare. Cf. STÖHR, o. c., p. 501 s.

128.
Quid de actibus solitariis.

b/ Utrum autem legitimari possint vel saltem *a gravi* excusari *omnes* actus solitarii, quatenus in illis, ratione ipsius status conjugalibus, *semper* salvetur ordo ad copulam, *solemnis est controversia*.

Plerique Auctores moderni ⁽⁴⁾ *probabilem* censent opinionem benigniorem, ac juxta illam a gravi culpa immunes declarant conjuges descriptos actus admittentes, modò absit periculum proximum pollutionis ⁽⁵⁾.

1. Cf. *Collat. Brug.*, t. XIV, p. 598 ss. coll. p. 535.

2. L. c., p. 673. ss.

3. Ita etiam contigisse novimus cum neo-nupta, eam nempe non posse a viro absque gravi dolore cognosci nisi postquam prævic, iteratis manipulationibus, vaginam dilatandam curaverit. Cf. STÖHR, o. c., p. 499-501, ubi notat convenientiam et simultaneitatem summæ libidinis in utroque congreidente multum favere foecundationi.

4. Ita inter alios : BALLERINI-PALMIERI, t. VI, n. 611 ; BUCCERONI, o. c., n° 1082 ; LEHMKUHL, o. c., II, n. 840 ; NOLDIN, *De sexto Præcepto et usu matrimonii*, n. 88 ; CAHAREL, *Agnologia et Asotologia*, Brioci, 1905, p. 204 s. ; HAINE, *Theologia moralis Elementa*, Lovanii, 1894, IV, p. 233 ; MATHARAN, *Casus de Matrimonio*, Parisiis, 1893, n. 491 ; GENICOT-SALSMANS, o. c., II, n. 547 ; MARC, o. c., II, n. 2113 ; AERTNYS, *Fasciculus*, n. 39, quær. 3° ; hi tamen tres ultimi, cum S. ALPH., o. c., l. VI, n. 936, alteram sententiam probabiliorem censent.

5. Dicitur : *a gravi culpa*, quia passim illos conjuges levis peccati arguunt, ratione intentionis finem operis excludentis. Addunt : *modò absit periculum*

Atvero ægre possumus admittere sententiæ illius *probabilitatem* nec intelligere valemus quomodo, ratione ipsius status conjugalis, cohonestentur quilibet descripti actus in eisque ordinatio ad copulam servetur *universim et semper*, etiam v. gr. in casu absentiae quantumvis diuturnæ conjugum ab invicem.

Nimirum sedulo est facienda distinctio inter actus *mutuos*, a conjugibus admissos, et actus *solitarios*: priores sponte sua ordinantur ad copulam tanquam ad suum naturale complementum, et ideo liciti sunt extra adjuncta actualem connexionem cum copula inducentia, etiam ubi copula prævidetur non instituenda; posteriores contrà natura sua potius ordinantur ad pollutionem, et ideo non accipiunt ordinationem ad copulam nisi ex speciali connexionem ad eam, ratione adjunctorum in quibus admittuntur.

Tunc igitur et non aliter a gravi excusandi sunt conjuges solitarios actus ponentes, quando hi actus, *pro peculiaribus adjunctis in quibus admittuntur*, haberi possunt tanquam copulam perficientes eamve præparantes⁽¹⁾: uti obtinet in casibus modò relatis, et quemadmodum etiam non sine probabilitate dices obtinere cum actibus solitariis admissis, quousque ad invicem præsentem sunt conjuges aut facile convenire possunt et copulam instituere.

Attamen, cum benignior sententia a pluribus iisque egregiis Auctoribus habeatur uti probabilis, potest confessarius, *cui intrinseca illius improbabilitas non est perspecta, auctoritate extrinseca niti* ut severiorem solutionem non urgeat.

129.
Quid de actibus internis.

Nota. Quod spectat *actus internos* extra circumstantiam copulæ, et sine ordinatione ad illam, puta absente comparte, admissos: possunt conjuges desiderare copulam futuram, voluntate probare copulam habitam, necnon voluntate sibi complacere in copula qua præsentem cogitata⁽²⁾; objectum namque variorum illorum actuum est res licita. Ab hisce autem sedulo distingue commotionem

pollutionis, quia pro illis actibus solitariis non reperitur, sicut pro mutuis, ratio sat urgens ut illi periculo se exponere possint conjuges.

1. Ita etiam SALMANTICENSES, o. c. cap. XV, n. 87; PRUNER, o. c., I, p. 411; VAN DER VELDEN, *Principia theologiæ moralis*, II, n. 399. PALMIERI, in nota ad Ballerini, dicit sibi rationes Auctoris esse captu difficiles; pariter PISCETTA, *De Luxuria et de usu Matrimonii*, Augusti-Taurinorum, 1908, n. 101, monet animum in severiorem sententiam inclinare.

2. Cf. *Collat Brug.*, t. XIV, p. 576 ss., ubi variæ notiones actus interni proponuntur.

carnalem in ipso corpore, et delectationem ei adnexam, de cujus commotionis provocatione judicandum est sicut de actu venereo solitario.

PARAGRAPH II. RIGHTS AND DUTIES OF CONJUGAL RELATIONS.

FIRST POINT. EXISTENCE OF THESE RIGHTS AND DUTIES.

The rights and duties that married persons mutually and *exclusively* possess in their conjugal relations, have their origin in the bond of marriage.

130.
Married persons have the right to demand, and the duty to render the marriage debt.

This bond is a moral bond, which unites the parties and associates them as a common principle for the procreation and education of children. But they cannot become a common principle of procreation otherwise than by sexual intercourse. For this, it is necessary that each of the parties should possess a right over the body of the other, a real right of proprietorship for the generation of offspring. This is a *strict right*, resulting from a bilateral contract; consequently the corresponding obligation is an obligation *of justice*; this obligation is *grave*, considering the gravity of the interests involved.

This mutual right is moreover an *exclusive* right, incompatible with the possession of a like right by any third person. It follows from this that any attempt at unlawful intercourse constitutes a grave sin of injustice. This is a consequence of the *unity* of marriage, of which we shall speak later.

It is important to observe, that these rights and duties extend only to the essentially *lawful* use of marriage; that is to say, to *all* that tends to procreation, and to everything that is, of its nature, fitted to that end. All devices directed against generation are excluded.

131.
These rights and duties extend to all lawful use of marriage, and to that alone.

Consequently the marriage bond affords no ground for any right, or for any obligation in the matter of sodomitical, onanistic, or voluntarily infecund relations of any kind whatever. Nevertheless, on the other hand, the *rights and duties* in this matter are not restricted solely to cases where actual fecundation is possible, but they extend to all relations that, *of their nature*, objectively speaking, are fitted for generation, though the force of circumstances may, perchance, render this intrinsic aptitude ineffective.

Taking into account the power of passion, the position of married people, bound to live together for the education of their children, would be unbearable, if they were under the obligation of restricting their relations solely to those occasions on which actual fecundation was possible. They must necessarily have recourse to constant relations — we mean, of course, lawful relations — as a necessary sedative ; and for that, we repeat, they must have a real right and a real obligation with respect to one another.

Corollary. « The party who by unlawful means incapacitates himself from rendering the marriage debt, sins grievously against *justice* ; for, the same law of justice that binds him to these relations, forbids him to make himself impotent by any unlawful act. If, then, the husband indulges in frequent acts of pollution, or maintains an unlawful intercourse with other women, in such a way that he is no longer capable (or notably less capable) of intercourse with his own wife, besides the sin of adultery or of (adulterous) pollution, he is guilty of (another) special sin against justice, which he is bound to mention in confession.

He may, too, sin grievously by giving himself up to practises that are good in themselves, but excessive and indiscreet, such as excessive acts of mortification, prolonged watchings, or overwhelming toil, if he thereby renders himself notably less fit for the marriage debt » (1).

In like manner the husband who, in any way whatever, deprives himself of generative power, should recognise that he is guilty of a grave sin of injustice against his wife, except in the case where an operation of this kind is considered necessary for the preservation of his life. The same judgment (with the same exception) must be passed upon the wife who has recourse to the excision of the ovaries or of the uterus, or to oophorectomy, in order to escape the dangers and inconveniences of pregnancy. Such cases occur. See below, n° 143.

Note. As soon as one of the parties is in the requisite condition to make use of the right, *and demands it*, the other party is bound *in justice* to render the marriage debt. Apart from the case in which one of the parties demands this as a strict right, the *law of charity* may require that it should be tendered. See below, n° 141.

There is scarcely ever any question of an obligation of *justice to ask* or *demand* the marriage debt ; but on the other hand, the

1. THEOL. MECHL., o. c., n° 43, question I.

obligation of *charity* is of frequent occurrence. This is the case where it is a question of removing the danger of incontinence of one of the parties, especially when a certain natural reserve, well known to the other, prevents the manifestation of the desire ; or again when mutual love is beginning to languish and there is need to revive it ; or, lastly, for the common good, when the birth of a child is of public importance.

SECOND POINT. PRINCIPLES REGULATING THE EXERCISE OF THE CONJUGAL RIGHT.

The right to lawful relations is of the very essence of the matrimonial contract and of the conjugal bond formed by marriage. As long as the marriage lasts, this inviolable and inalienable right belongs to the married couple, and they have no power to renounce it, e. g., in favour of some third person ⁽¹⁾.

132.
Distinction between the right to relations and the lawful exercise of that right.

It may happen, however : 1° that the *actual exercise* of this right (the right itself remaining unimpaired) may be forbidden to either one or the other of the parties, or even to both at once, for a certain space of time, or for ever. In other words, it may come to pass that the parties, while retaining full possession of their reciprocal *title to the ownership* of one another's body, may find themselves deprived of, or suspended from, the *enjoyment of that title* ⁽²⁾. It may happen 2° that *the actual exercise of the conjugal right may be unlawful* on account of some particular circumstance affecting the sexual act itself, or the party who demands it ; 3° where one of the parties has a full right and may lawfully use it, it is quite possible that the other party may have good and sufficient reason for refusing. These three distinct points justify the three following principles.

FIRST PRINCIPLE. *The actual enjoyment of the right to conjugal relations may be lost or suspended in different ways, as concerns one or both of the parties.*

133.
The enjoyment of the conjugal right may be lost or suspended :

1. Thus a bachelor who maintains unlawful intercourse with another man's wife, with the husband's consent, is guilty of adultery and so of grave injustice to the husband.

2. The party who has forfeited the enjoyment of his title, no longer has any *actual* right to conjugal relations. Nevertheless, it would be an injustice to him, if some third party took his place.

A. In the first place, by the spontaneous renunciation of the parties :

1° in consequence of the renunciation of the parties ;

1. *Mutual* renunciation may be explicit or implicit, as is almost always the case when husband and wife, by mutual consent, take a vow of chastity (1). Mutual renunciation evidently deprives both parties of the power of *using* the strict right to conjugal relations, and at the same time releases them from the obligation in justice to render the marriage debt.

2. In *unilateral* renunciation, the party making it renounces the exercise of his right with respect to the other. Consequently he can no longer exact conjugal relations, and the other party is no longer bound to satisfy him (2). But the party, who has not renounced, keeps intact the personal right, and so may exact from the other the rendering of the marriage debt.

B. In the second place, by the violation of conjugal fidelity.

2° in consequence of violation of conjugal fidelity ;

The unfaithful party no longer has a right to the submission of the other party in the matter of conjugal relations. It is especially the case of *adultery* that we have in view here. The guilty party remains deprived of his rights until the other party restores them by condoning the fault, or until the injured party has in turn become guilty of a like transgression.

C. In the third place, by the loss of reason.

3° by the loss of reason ;

The conjugal right must be exercised in a *human* fashion. Hence it may not be made use of by one who is deprived of reason, and so incapable of a *human act*. This holds good whether the loss of reason is permanent, or only for the time being, as for instance, when a man is dead-drunk.

D. In the fourth place, by ecclesiastical regulations.

4° by ecclesiastical regulations.

1. For the case in which the Church permits separation *quoad torum et mensam*, see below, art. 3, n° 153.

1. It is true, one can imagine a case in which husband and wife, by common consent, take a vow of chastity, while reserving the right to exact conjugal intercourse. This will be more fully elucidated by the explanation of the following principle.

2. The party who has renounced the exercise of his right cannot *exact* conjugal relations, i. e., as a matter of right, binding the other party in justice ; but he is free to manifest a desire, and to make a request, unless for some reason of another kind even such a request is forbidden him.

2. *During the first two months of the marriage:* in the case in which one of the newly married parties thinks of entering religion ⁽¹⁾, the Church deprives the other party, during the first two months, of the right of exacting conjugal relations, and releases the former from the obligation to the marriage debt.

This ecclesiastical rule is contained in the provisions of cap. 2 et 7, X, III, 32, according to which it is at the option of the one party, even against the will of the other, to leave the married state and enter religion, on condition that the marriage *has not been consummated*. The Church allows two months for coming to a decision, and if the one party seriously thinks of taking this step, it gives him the right of denying himself to the other. The two months are reckoned from the day of the marriage, or, in case of dispute, from the day fixed by the ecclesiastical judge. The judge has power to prolong the delay ⁽²⁾.

Once the marriage is consummated, the right of entering religion is at an end, and consequently also the right of denying oneself to the other party, unless the consummation of the marriage has been brought about by deceit or violence. Under such circumstances the victim does not lose the right, but religious profession does not dissolve the marriage, since this is now *ratum et consummatum* ⁽³⁾.

SECOND PRINCIPLE. *The actual exercise of the conjugal right may also become unlawful by reason of some particular circumstance affecting either the conjugal relations themselves, or the person of the party soliciting them.*

134.

The exercise of the conjugal right may become unlawful:

Explanation.

A. CIRCUMSTANCES AFFECTING THE CONJUGAL RELATIONS.

It is a question here of circumstances that vitiate the sexual act, neither in its essence nor in its fecundating qualities, but which, nevertheless, render it mortally or venially sinful in itself, unless some sufficient reason justifies it. The circumstances of which we

¹⁰ By reason of some circumstance affecting the relations themselves, such as :

1. It means entering a religious order strictly so called, with solemn vows. The privilege in question has been granted in favour of the religious state, and can profit those only who seriously think of embracing it.

2. Cf. *Causa Placentina*, of 3 Feb. 1725, in BENEDICT XIV, *Quaestiones Canonicae*, qu. 420 ; and compare with KUTSCHKER, O. C., I, p. 288 ss.

3. FAHRNER, O. C., p. 302 s.

speak are an extraneous addition to the relations, and lend them an adventitious and accidental malice, that, in most instances, a reason of utility or of proportionate necessity is capable of removing.

Exempla.

*circumstantia
loci,*

1. Circumstantia **loci**, puta sacri, in quo conjugibus non licet copulari nisi adsit admodum urgens ratio, v. gr. incontinentiam vitandi per diuturnam in tali loco commorationem, uti potest contingere tempore belli, persecutionis.

modi,

2. Circumstantia **modi**, quatenus fiat coitus extra *situm* naturalem, puta inter virum succubum et mulierem incubam, vel a latere aut a retro more pecudum, potius quam facie ad faciem, muliere succuba (¹). Inde inducitur inordinatio *venialis*, quae facile abstergitur si rationabilis adest causa dicto modo coeundi, v. gr. ad periculum abortus vitandum in uxore praeegnante propter obesitatem viri, vel frigiditatem vincendam alterutrius; supponitur autem servari essentialem copulae ad generationem ordinationem (²).

scandali,

3. **Scandalum**, ex eo quod copula peragatur coram adstantibus; quod scandalum adeo grave videtur ut vix ulla causa ab ea excusare valeat (³).

1. Ille est *situs* pro norma servandus, quem natura indicat in ipsa membrorum genitalium dispositione, quique magis favet debita seminis virilis susceptioni, cum ita intimius penetrentur corpora ac altius deponatur semen; coitus tamen alio sub situ institutus, modò fiat in vase debito et absque seminis profusione, potest esse generationis fini idoneus, perfectioris penetrationis defectui supplente motu vitali quo ad corporis muliebris penetralia ingredienda gaudent spermatozoida; et ideo in hujusmodi situ inordinatio est *secundum quid* dumtaxat et *venialis*. Cf. STÖHR, O. C., p. 502 s.

2. Profecto essentialis foret defectus, copulam *substantialiter corrumpens*, si debitum vas non fuit servatum, sodomitico congressu, vel semen fuerit penitus profusum. Ideo attendendum est confessario audienti poenitentem confitentem se copulam instituisse retrorsum: caute scilicet et prudenter inquirat utrum salva fuerit essentialis aptitudo ad finem generationis, servato vase naturali nec profuso semine: de qua aptitudine si constat, absteat sacerdos ab ulteriori inquisitione circa determinatum coeundi modum. Cf. infra monenda de munere confessarii.

3. Id potissimum valet respectu puerorum ac puellarum pubescentium: cæterum urgenda est apud parentes providissima vigilantia ne, praesentibus liberis etiam junioribus, aliquid agant quo infantilis phantasia fœdari queat.

4. **Nocumentum** ex usu matrimonii timendum, praesertim pro *nocumenti* ; uxore vel pro concepta prole ; quod nocumentum, ad hoc ut exinde illicita reddatur copula, admodum grave requiritur : eo autem posito, ratio urgentior potest usum matrimonii legitimare.

Ex hoc capite, per se et seclusa positiva prohibitione, *non est illicitum* copulam exercere :

a/ tempore *prægnantiæ*, nisi per accidens et omnino exceptionaliter experientia constet extraordinarium ac imminens adesse periculum abortus ⁽¹⁾, vel gravioris nocumenti pro prole concepta, uti contingere posset in ultimis prægnationis temporibus.

b) tempore *puerperii*, seu per primas inde a partu hebdomadas : datur quidem periculum pro muliere puerpera, tum ex virium debilitate ⁽²⁾, tum ex abnormi dilatatione uteri, paulatim ad pristinam molem redeuntis ⁽³⁾, et ideo favendum est usui differendi reassumptionem conjugalis consortii ⁽⁴⁾, sed regulariter non vide-

1. Cf. STÖHR, o. c., p. 504 s. : periculum abortus ex copula potissimum datur tempore *incipientis* prægnantiæ, quod periculum non est attendendum cum de incæpta prægnantia non constet ; postquam autem certa evaserit imprægnatio, periculum jam minus est et practice nullum vel leve, in communibus adjunctis, modò moderate exerceatur coitus tam in modo quam in frequentia.

2. « Mulier, gravissima vitæ actione vix peracta, physiologicos quidem sed vehementissimos dolores in ipsis membris genitalibus pertulit, et vel robusta puerpera fatigatam ac debilitatam se sentit ». CAPELLMANN, o. c., p. 150. Cf. etiam GEMELLI, o. c., p. 67 s.

3. « Puerperium multas res secum fert, quæ quolibet alio tempore morbosæ dicendæ essent, quamquam hic physiologicæ sunt. Reductio et restitutio uteri adeo dilatati fortiorem organismi actionem postulat, imo ex recentiorum observationibus fere integra resorptio et reconstructio uteri locum habet. Res quæ hoc tempore in organis generationis aguntur, immutationes ac violationes gravitate productæ, jam disponunt per se ad varios morbos : ad sanguinis profluvia, inflammationes, positiones uteri aberrantes ; quare in directa locali irritatione qualem copula secum fert, atque etiam in universa commotione per copulam excitata, aliquid periculosum et damnosum esse nemo non fatetur. Hoc autem damnum, ut patet, eo perniciosius erit quo partui propius ». CAPELLMANN, o. c., p. 140.

4. Solent conjuges in nostris regionibus ad usum matrimonii redire inde a die introductionis in Ecclesiam et benedictionis post partum. Et ideo bonum est ut parochi parturientes ad illam benedictionem ocus non admittant. Antiquitus in ecclesia recipiebantur, conformiter ad legem mosaicam, post 40 dies inde a natiuitate prolis masculinæ et post 80 dies inde a natiuitate puellæ ; deinceps autem servatum est uniformiter spatium 40 dierum. Cf. FRANZ, o. c., p. 215 ss., ubi etiam curiosas praxes describit, per medium ævum usurpatas, in cæremonia benedictionis post partum.

tur satis urgens periculum ut ideo, saltem sub gravi, prohibeatur concubitus.

c/ tempore *fluxus menstrui* ⁽¹⁾, quia rursus, si periculum datur nocendi mulieri, levius reputatur ⁽²⁾, et ex alia parte est circumstantia favens potius fœcundationi.

Dicitur : « *de se et seclusa positiva prohibitione* », quia olim variæ prohibitiones hinc inde erant latæ vel consuetudine introductæ ⁽³⁾.

non autem ex
circumstantia
temporis
sacri.

Nota. 1. Circumstantia *temporis sacri*, pœnitentiæ sive devotionis exercitiis peculiariter addicti, sub hodierna disciplina, non

1. *Fluxus menstruus* sæpe confunditur cum decisione ovuli maturi ab ovariis transeuntis per uterum et vaginam : sunt tamen duo phenomena distincta, licet plerumque simul coincidant. « La maturation et l'expulsion de l'ovule, docet FOREL, o. c., p. 54, sont en général accompagnées chez la femme d'un phénomène nerveux, proche parent de l'érection chez l'homme. La muqueuse de la cavité de la matrice est très riche en vaisseaux qui ont la faculté de se dilater fortement et de se gorger de sang sous l'influence inhibitrice de certains centres nerveux. Comme la muqueuse est très fine... le sang transsude au travers de la muqueuse et s'écoule sous forme de ce qu'on appelle les règles ou menstrues. Leur but est sans doute de préparer convenablement la muqueuse de la matrice à la fixation de l'œuf fécondé qui viendra se greffer à sa surface... »

Les deux phénomènes peuvent avoir lieu indépendamment l'un de l'autre, car les menstrues en elles-mêmes dépendent uniquement d'une irritation nerveuse, qui peut être, par exemple, provoquée ou arrêtée par la suggestion hypnotique.

2. Incommodum oriri potest ex levi irritatione per copulam tunc exercitam forsan provocanda, necnon ex verecundia cui mulier menstruata peculiariter est obnoxia, unde fit ut passim consortium fugiat.

3. Similes *prohibitiones* refert MARTÈNE, o. c., L. I. P. 2^a, c. IX, art. IV, sub n. VIII-IX. Ita citat statutum Heraldii Turonensis : « Fideles se abstineant a coitu prægnantium uxorum et menstruo tempore » ; in rescripto S. Gregorii ad consulta S. Augustini Anglorum apostoli legitur : « Ad ejus (uxoris) vero concubitum vir accedere non debet, quoadusque qui gignitur ablactetur ». Alibi statuitur : « Conjugales continere se debent... in illis diebus quibus uxor prægnans, hoc est a die qua filius in utero ejus motum fecerit, usque ad partus sui diem ; item a partu per 36 dies, si masculus, si vero filia per 46 dies ». Vulgata etiam erat opinio quod ex copula cum tali muliere monstrum gigneretur, leprosus scil. fœtus vel elephanticus quatenus sanguis menstruata esset infectus ; cf. S. HIERONYMUS, *In Ezech.*, XVII, 6 (*Migne*, XXV, col 173). Existebant etiam in medio ævo præscriptiones hinc inde vigentes, quibus menstruata ab ingressu ecclesiæ prohiberentur. Cf. FRANZ, o. c., p. 214 s. ; MOY, o. c., p. 383 ss.

Severa in hac re erat *Lex Mosaica*, *Lev.*, XVIII, 19, vetans omnem congressum cum menstrua patiente, et quidem, juxta c. XX, 18, sub pœna mortis. Et ita *Ezech.*, XVIII, 6, quasi in justitiæ signum tradit quod « uxorem proximi sui non violaverit et ad mulierem menstruatam non accesserit ».

est ratio copulam conjugalem prohibendi ; ad summum posset *dis-suaderi* ratione instantis S. Communionis, ratione temporis quadragesimalis, vel ratione solemnioris fesivitatis (¹), idque prudenter et moderate, ac ea dumtaxat lege ut non modo salva sint jura compartis ac seclusum incontinentiæ periculum, sed etiam ut inde non gravetur altera pars, nec mutuo conjugum amoris noceatur.

2. Circumstantia quæ et in quantum reddit usum matrimonii *objective* illicitum, eo ipso auferet jus expeditum et obligationem ad illum, siquidem non datur jus et obligatio ad rem *objective* inhonestam (²).

B. CIRCUMSTANCES AFFECTING THE PARTY SOLICITING THE 20 RELATIONS.

These circumstances are verified where the party in question has taken the *vow* of *chastity*, and also where he uses marriage *with a bad intention*, e. g. by substituting in his mind another person for his legitimate wife (intentional adultery) ; or finally where the Church forbids him, by way of punishment, *to solicit* the relations, as it occurs in the case of unlawful affinity contracted by his fault during the marriage.

If then it is a question of such a circumstance, the party con-

135.
By reason
of some
circumstance
affecting
the party soli-
citing the
relations, e.g.:

1. Cf. MARTÈNE l. c., n. I-IX. Commendabatur vel præcipiebatur conjugalibus abstinentia diebus et noctibus *Dominicis* ac *festivis*, idque potissimum in reverentiam S. Communionis suscipiendæ, cum in textibus ibidem relatis addatur : « ut securius communicent », « ut sincera et secunda conscientia ad altare Domini casto corpore et mundo corde præsumant accedere ». Nonnunquam mentio fit pœnæ consequentis ex inobservatione, quatenus si « in ea (die Dominica) conjuges simul convenerint, exinde aut contracti, aut epileptici, aut leprosi nascuntur ».

In majoribus festivitibus Paschatis et Pentecostes, per integram octavam continentia erat servanda, ac in Natalibus Domini per 20 dies et noctes. Ulterius ab usu matrimonii abstinendum per Quadragesimam et per Adventum (in quibusdam locis : a festo S. Martini), ad instituendam præparationem ad Pascha et Natalia Domini in oratione et pœnitentia, a quibus removebat voluptas carnalis.

Etiam diu mansit in usu ut, prima nuptiarum nocte, vel etiam biduo aut triduo post nuptias, ab usu matrimonii abstinere neo-conjuges, ad exemplum Tobiae junioris, et in reverentiam benedictionis nuptialis acceptæ. Cf. MOY, l. c.

2. Supponitur copula non intrinsece vitata, sed de se apta generationi, juxta notata sub n. 134 : secus namque ad eam ne radicale quidem haberetur jus, uti vidimus sub n. 130.

cerned *sins* by soliciting the rendering of the marriage debt ; however *he does not act against his matrimonial right*, the sexual act itself being in order. He keeps, strictly speaking, the actual right to exact the relations, by the fact of the conjugal bond (unless he would be deprived of it for other reasons) ; his fault relates only to the personal circumstance which should withhold him. Consequently the other party is bound in justice to satisfy him, and his material co-operation to the sinful act of the consort, must yield to the duty of justice. If the party not involved in the aforesaid circumstances exacts the relations, it is evident that he is in his full right, and that the other has to submit himself to it.

Applications.

1. *Votum castitatis.*

136.
a) *ex voto castitatis, ante matrimonium emissum,*

a/ *Votum castitatis ante matrimonium emissum*, et non dispensatum ⁽²⁾, ubi non dirimit matrimonium ⁽¹⁾, illud regulariter prohibet contrahendum ⁽³⁾, ac contracto matrimonio, *voventem privat licentia, non jure stricto, petendi debitum.*

Dicitur : « *privat licentia petendi, non jure* ». Nimirum :

*ratione cujus
vovens privatur
non jure,
sed licentia
petendi debitum,*

1. pars vovens votum castitatis servare tenetur in quantum, salvo jure compartis, servari potest : non potest ergo *licite* petere, cum a petendo possit, illæso jure alterius partis, abstinere.

2. conservat *jus* petendi seu exigendi debitum, quia copula non est objective ac in se inhonesta, nec votum illud importat necessario renuntiationem juri in matrimonio accipiendo.

3. potest *reddere*, idque debet, comparti *jure exigenti*, ad hoc ut hujus jus sit salvum ; quodsi compars non habet jus exigendi ⁽⁴⁾,

1. De dispensatione super voto castitatis in ordine ad matrimonium contrahendum, infra agetur ubi de dispensationibus.

2. Matrimonium irritat votum solemne emissum in Religione stricte dicta ; item votum simplex a scholasticis S. J. emissum post biennium novitatus. Cf. infra ubi de impedimento dirimente Voti.

3. Dicitur *regulariter* ; et ita excipitur casus quo quis, gravi de causa, v. gr. ad legitimandam prolem, contraheret, consentiente comparte, cum intentione ingrediendi Religionem ante matrimonii consummationem. Cf. dicenda sub n. 247.

4. Ita in primo bimestri, parte voto obnoxia de ingredienda Religione deliberante ; vel si ipsa compars esset adulterata ; vel si compars renuntiaverit juri suo, quæ tamen renuntiatio per se non necessario continetur in consensu quem præstitit in votum a parte vovente emittendum.

pars vovens non debet, adeoque non potest, reddere, nisi, in casu particulari, ratione instantissimi periculi, quod dispensatione praeveniri nequeat, voti observatio evaserit moraliter impossibilis (1).

Quod spectat *compartem voto non ligatam, potest ac debet*, attento jure stricto debitum exigendi penes partem voventem remanente, *reddere* debitum, cum obligatio justitiæ prævaleat cooperationi materiali ad malam actionem voventis; *potest* etiam debitum *petere*, cum utatur jure suo, nec provocet compartem ad peccatum, siquidem hæc reddere licite potest conjugii jure petenti. Ad hoc autem ut pars libera reddere possit ac debeat, supponitur partem voto obstrictam *aliunde* non amisisse *jus* debitum petendi: aliàs non deberet pars libera debitum reddere nec etiam stricte posset, ratione cooperationis ad peccatum compartis, nisi proportionata de causa (2).

b/ Quod attinet votum *matrimonio succedens*, non irritatum (3), nec dispensatum, nec matrimonium dissolvens (4): si fuit emissum votum castitatis *perfectæ* (5), omnis parti voventi *interdicitur* usus matrimonii, non tantum ad petendum debitum, sed etiam ad reddendum (supponitur enim compars non habere jus exigendi redditionem, cum votum castitatis perfectæ non possit a conjugee emitti, nisi compars juri suo cesserit vel eo fuerit privatus); potest tamen pars vovens conservasse expeditum *jus*, attentis scil. modò

*vel post ma-
trimonium
emisso,*

1. Cf. DIGNANT, *De Virtute Religionis*, Brugis, 1896, n. 182; LEHMK., o. c., I, n. 457, coll. tamen II, n. 846; S. ALPH., n. 225, l. III, collato etiam l. VI, n. 930.

2. Talis causa facile obtinet in uxore, cui sæpe grave erit semper petere debitum.

3. Probabilius non potest maritus *irritare* votum castitatis uxoris, neque *directe*, cum mulier in re castitatis non censeatur subjecta viro, ac servet suam naturam independentiam; neque *indirecte*, quia non nocet regimini domestico, cum votum supponatur emissum salvo jure compartis.

4. Matrimonium contractum, ratum non consummatum, dissolvitur per solum votum solemne in Religione stricte dicta.

5. Potest conjux valide et licite vovere castitatem *perfectam* 1/ ubi et in quantum locus est privilegio primi bimestris, de quo n. 133, sub 4º; 2/ id potest valide, consentiente comparte, et etiam licite, salvis cautelis sub n. 158 describendis; 3/ id potest validè et licitè, quando compars est a jure suo in perpetuum decisa, puta si adulterium admisierit, vel lapsa est in hæresim aut apostasiam et separatio est judicialiter concessa in perpetuum. Extra casus enumeratos, non potest conjux valide vovere castitatem perfectam, nequidem in Religione (VERMEERSCH, *De Religiosis Institutis et Personis*, 2ª ed., Brugis, 1907, I, n. 145).

dictis necnon præoccupatis supra, sub n. 133, A. Si fuit emissum votum castitatis *imperfectæ* ⁽¹⁾, servandæ scil. illæso jure compartis, valent dicta sub a/.

Corollarium. Quod valet de debito stricte dicto seu de copula, valet de omnibus actibus venereis *non consummatis*, ad copulam ordinatis : pars vovens non potest illos licite petere sed jure petit, ac eos reddere potest et debet comparti jure exigenti ; compars autem libera potest ac debet dictos actus reddere parti voventi, jure petendi aliunde non privatæ.

salva dispensatione.

Nota. a/ Amissa licentia petendi debitum potest ab auctoritate ecclesiastica *restitui* ⁽²⁾. Id valet *Episcopus* ex potestate *ordinaria*, quotiescumque votum non est certum vel non perfectum ⁽³⁾, vel etiam, ubi certum est ac perfectum votum, quando periculum est in mora, et agitur de voto jure et facto occulto, privatim scil. emisso et ignoto ⁽⁴⁾.

Uterius ex potestate *delegata* solent accipere Ordinarii (et in specie Ordinarius *Brugensis*), in *Pagella* S. Pœnitentiariæ, facultatem pro foro conscientiæ, « dispensandi *ad petendum debitum conjugale* cum transgressore (perfecti) voti castitatis privatim emissi (non in congregatione religiosa) ⁽⁵⁾, qui matrimonium cum dicto voto contraxerit, hujusmodi pœnitentem monendo ipsum ad idem votum servandum teneri, tam extra licitum

1. *Valet* autem emissum votum castitatis *imperfectæ*, in quantum scil. non nocet juri a comparte acquisito, nempe quoad non petendum debitum : ad hoc enim non extenditur jus alterius partis. Contraria videntur cc. 11 et 16, Causa XXXIII, qu. V ; sed hæc capita possunt intelligi de voto continentiae *absolute servando*. Cf. ESMEIN, o. c., II, p. 4 s., et p. 22 ss. Ubi valet illud votum, etiam de se licet, sed ipsi raro est opportunus locus.

2. Restitutio illius licentiæ (vel, uti passim minus accurate dicitur, juris petendi debitum), amissæ ex voto, vocatur etiam dispensatio voti secundum quid, unice scil. in ordine ad debitum petendum.

3. Ut votum sit *perfectum* debet esse perfectum tum ex parte actus, tum ex parte materiæ, juxta latius exposita apud *Collat. Brug.*, t. VI, p. 328 ss. ; tale plerumque non est votum in matrimonio emissum, juxta modo dicta. Cf. etiam infra, n. 357.

4. Ex hac potestate ab Episcopo delegata possunt etiam, in diocesi Brugensi, *Decani* dispensare commutando, in ordine ad petendum debitum, super voto non reservato castitatis, juxta dicenda n. 369. Idem valent *confessarii*, tempore missionis necnon quibusdam temporibus privilegiatis, infra limites ibidem describendos.

5. Si votum fuit emissum in congregatione religiosa, dispensatio est obtinenda a S. Sede, et quidem a Congr. S. Negotiis Religiosorum præposita.

matrimonii usum quam si marito vel uxori respective supervixerit » (1). Cf. infra, n. 369.

b/ Ubi matrimonium absque dispensatione est initum ab habente votum castitatis, sæpe opportunum est illum relinquere in bona fide circa prohibitionem debitum petendi, donec impetrata fuerit dispensatio seu restitutio juris amissi. Idem valet, proportionem servata, de casu quo imprudenter emissum est votum post matrimonium.

c/ Quoad *reliqua vota vitæ perfectioris*, si ipsis spretis matrimonium est initum illicite : votum *virginitatis* (2) efficit ut pars voto ligata non possit licite petere debitum *ante consummationem*, dum altera pars licite et jure petit ; matrimonio autem consummato, jam ad nihil obligat, cum ejusdem observatio impossibilis evaserit. Votum *Religionis* ingrediendæ est observandum quousque jus habet vovens Religionem amplectendi, juxta inferius dicenda, ubi de separatione a tecto ; aliàs ad nihil obligat. Ratione voti *cœlibatus* ad nihil tenetur conjux ; nec etiam ratione voti *suscipiendi ordines*, nisi exceptionaliter contingat compartem solemniter vovere, uti eodem loco exponetur.

137.

Quid de aliis
votis.

Observe tamen ubi dicuntur tria ultima vota ad nihil jam obligare, id in-

1. Ex potestate subdelegata, eadem facultate gaudent, pro actu sacramentalis confessionis, in diœcesi Brugensi, Decani, ac etiam confessarii ad audiendas confessiones, tempore missionis, deputati. *Stat. diœc. Brugenſis*, P. I, tit. II, art. 6 ; cf. infra, n. 369.

Formula sequens adhiberi potest ; post exceptam scil. confessionem et elargitam absolutionem sacramentalem, dicat : « Insuper auctoritate apostolica mihi specialiter subdelegata, super voto castitatis, quod emisisti, ad hoc ut debitum conjugale licite exigere possis tecum dispenſo. In nomine P. et F. et Spir. S. — Passio Domini... ».

Cum autem in casu dispensetur simpliciter, et non tantum dispensando commutetur, mitius potest procedere confessarius, pro *pœnitentia* imponenda, ac in casu quo exequendum habet rescriptum Romanum : in hoc nempe committitur executor ad commutandum dispensando, idque sub iisdem severis clausulis quam in rescripto concesso in ordine ad matrimonium ineundum : de quibus infra, sub n. 398. De hisce cf. PLANCHARD, *Dispenses*, nn. 589-600.

2. Distinctionem inter vota cœlibatus, virginitatis et castitatis, videsis apud ZITELLI, o. c., p. 98 et VAN DE BURGT-SCHAEPMAN, o. c., p. 326 et 330, in nota. Nimirum « objectum *voti castitatis* est abſtinentia ab omni delectatione venerea, sive externa, sive interna, sive licita... sive illicita ; voti *virginitatis* : abſtinentia a primo opere carnali consummato ; *cœlibatus* : abſtinentia ab ineundo conjugio ; *suscipiendi ordines* : susceptio sacri Ordinis subdiaconatus ; *ingrediendi Religionem* : ingressio Ordinis religiosi stricte dicti, scil. cum votis solemnibus ».

telligi *respectu præsentis matrimonii* : soluto enim conjugio, sponte reviviscunt.

2. Affinitas superveniens.

138.

b) ex affinitate superveniente,

ob quam auferitur jus et licentia petendi debitum,

nisi conjux ob ignorantiam excusetur,

Conjux, contrahens in matrimonio affinitatem cum comparte sua, per copulam nempe habitam cum persona compartis consanguinea in 1^o vel 2^o gradu, amittit, *præter expeditum jus petendi*, a quo deceditur ratione adulterii, *licentiam petendi* debitum ⁽¹⁾, modo copula fuerit formaliter incestuosa ⁽²⁾, ac formaliter talis qualis pœnæ est obnoxia ⁽³⁾: a qua pœna excusat non tantum ignorantia legis ecclesiasticæ prohibentis, sed etiam probabilius ignorantia pœnæ ⁽⁴⁾.

Neque *jure* ergo debitum *petit* conjux incestuosus, neque *licite*, sed potest ac debet *reddere* debitum comparti, sive explicite sive tacite petenti, quippe cujus jus exigendi manet salvum, nisi aliunde sit ablatum ⁽⁵⁾; hæc autem compars potest licite petere debitum ac etiam petenti licite reddere ⁽⁶⁾, sed non debet reddere,

1. Cap. 1, 4, 6, 10, 11, X, IV, 13. Quod autem limitatur ad affinitatem in 1^o et 2^o gradu, eruitur ex eo quod Conc. Trid., Sess. XXIV, c. 4, ad illos gradus restrinxerit, pro affinitate *illicita*, vim dirimendi matrimonium contrahendum: quæ limitatio merito applicatur affinitati illicitæ supervenienti, quoad vim auferendi licentiam petendi debitum, licet contradicat PILLET, *Dictionnaire de Théologie*, v^o *Affinité*. Quæ nostra interpretatio confirmatur ex tenore facultatis S. Pœnitentiariæ mox referendo. Cf. etiam SANTI, o. c., ad h. 1., n. 9. Cæterum eadem restrictio graduum occurrit in *Comp. I, c. 2, IV, 13*.

2. Ita non incurreretur pœna a parte incestuosa nesciente complicem esse compartis consanguineam, vel ad copulam violenter coacta.

3. Item non esset pœnæ obnoxius conjux, si sciverit quidem complicem esse compartis consanguineam, falso autem putaverit eam esse consanguineam in 3^o tantum vel 4^o gradu: fuit copula formaliter incestuosa, sed non formaliter talis qualis pœna plectitur.

4. Ignorantia pœnæ excusat, saltem probabiliter a pœna incurrenda, quia videtur esse pœna principaliter medicinalis, quæ proinde ignorantem non afficit; in quantum autem diceretur pœna vindicativa, etiam non incurritur ab eam ignorante, utpote extraordinaria. Ignorantiam legis excusare a pœna passim docetur, eo vel magis quod minuitur in eos qui scienter crimen admiserunt. Cf. *Collat. Brug.*, t. IV, p. 430 s.

5. Si compars non servavit jus exigendi, neque reddere potest pars incestuosa, quia, attento tenore cc. 4 et 10, de se prohibetur usus matrimonii, et non conceditur facultas reddendi, nisi ut salva sint jura compartis. Cf. n. 139.

6. Equidem reddendo debitum cooperatur ad peccatum compartis incestuosæ, quæ nec jure nec licite petit; ast haud difficile adest causa cooperationem legiti-

sicut in casu voti, cum hic ab incestuoso, simul cum licentia petendi, ablatum sit, ratione adulterii, expeditum jus debitum exigendi.

Nota. a/ Cum prohibitio petendi debitum, contra incestuosum lata, *minus stricta sit*, uti modò notavimus, quam illa quæ urget votum habentem, potest ipse incestuosus ab hujus legis prohibiti-væ observantia excusari, non tantum ob impossibilitatem prohibitionem servandi, sed etiam ob gravem et urgentem rationem, nisi copia sit relaxationis impetrandæ.

b/ Conjugi, cui propter incestum prohibetur copula, permittunt plures Auctores ⁽¹⁾, secus ac in casu voti castitatis, tactus et actus *non consummatus*, cum prohibitio Ecclesiæ sit strictæ interpretationis.

c/ Conjux incestuosus qui, ratione ignorantiae legis vel pœnæ, pœnam evasit, *per se monendus est pro futuro*; atvero per accidens frequenter continget prudenter abstineri a monitione, nimirum ubi pœnitens versatur in bona fide, ac prævidetur in incestum relapsurus et legem non observaturus ⁽²⁾. Cæterum passim opportunius est recurrere ad remedium dispensationis.

d/ Potest ab autoritate ecclesiastica *dispensari*, seu potest restitui licentia debitum petendi: cujus licentiæ restitutioni si accedat restitutio *juris* (v. gr. per condonationem partis innocentis), jam nihil impedit quominus jure et licite petat conjux incestuosus.

Porro habent Ordinarii (et in specie Ordinarius Brugensis) ⁽³⁾, facultatem *aut dispensetur.* « dispensandi cum incestuoso seu incestuosa ad petendum debitum conjugale, cujus jus amisit ex superveniente occulta affinitate per copulam carnalem habitam cum consanguinea vel consanguineo, sive in primo, sive in primo et secundo, sive in secundo gradu suæ uxoris seu respective mariti; remota occasione peccandi, et injuncta gravi pœnitentia salutari et confes-

mans, et quidem facilius quam in casu voti, de quo sub. n. 136, si simul amissum est a parte vovente jus petendi, cum hic minus stricta sit, quam in casu voti, prohibitio lata; cæterum Ecclesia, in statuendo pœnam contra delinquentem, non intendit ullatenus gravare partem innocentem.

1. Cl. S. ALPH., l. VI, n. 933; LEHMKEUHL. o. c., II, n. 846.

2. *Collat Brug.*, t. IV, p. 432.

3. Eam subdelegatam habent, in diœcesi Brugensi, *Decani* habitualiter, transcunter autem confessarii missionis.

sione sacramentali singulis mensibus, per tempus arbitrio dispensantis statuendum » (1). Cf. *infra*, n. 369.

e/ Juvat animadvertere variam conjugis juridicam conditionem quoad usum matrimonii, in casu adulterii, voti castitatis et affinitatis supervenientis. Per *adulterium* nempe amittit *jus expeditum*, et non licentiam petendi, seu potest licite rogare et non valet in rigore juris exigere debitum; per *votum* privatur *licentia* et non jure (excepto scil. casu quo voti emissio importat renuntiationem juri), ita ut non possit licite petere sed valeat rigore exigere; per *affinitatem* amittit *jus simul et licentiam*, nec adeo potest licite petere nec valet exigere debitum.

139.
Provisions of
the ancient
law.

Observation I. The ancient ecclesiastical law, of which we find traces in the *Comp.* I, c. 2 and 4, IV, 13 (see also c. 8, X, IV, 13), decreed that cases of incest, at least if public, should be punished by separation. It even appears that, in certain places, by an abuse, the innocent party was permitted to contract a fresh marriage during the lifetime of the delinquent (2).

This was not permitted by the common law of the Church, which prohibited the re-marriage of the guilty party, even after the death of the innocent party, though it did not invalidate it. Later, out of regard for the innocent party, cohabitation was tolerated; but the use of marriage was limited to the demands of the innocent party.

The existing ecclesiastical law (3) still contains a prohibition against the subsequent marriage of the incestuous party with his accomplice; but this has fallen into desuetude. At the present time, the Holy See, in removing the prohibition against seeking conjugal relations, no longer inserts in the dispensation the clause forbidding a second marriage. In this it departs from the former practice (4).

140.
Effects of
supervening
spiritual
relationship.

Observation II. Formerly it was also necessary to pronounce separation *quoad torum et mensam* against husband and wife who contracted spiritual

1. *Formula* adhiberi potest illa quæ supra proposita est pro restituendo jure petendi debitum per votum amisso: sufficit indicare diversam causam juris amissi, nempe « per copulam habitam cum sorore (vel fratre)... uxoris (vel mariti) tuæ ».

2. Thus in Synodo Vermeriensi of which further under n° 200; thus also BURCHARD OF WORMS in Decreto, L. XVII, cc. 10 et 11 (MIGNE, P. L., t. CXL, col. 921), where he embodied the decrees of the aforesaid council, which permits a new marriage to the innocent party. Cf. ESMEIN, o. c., I, p. 382 s.; II, p. 67 s.; see below, n° 200.

3. Chapters 1, 2, 8, X, IV, 13.

4. Cf. SANTI, o. c., where he treats of this, nos 8 and 9; see also below, nos 242 and 301.

relationship with one another ⁽¹⁾. This penalty is analogous to that inflicted on incestuous partners, and, like it, is accompanied, in respect of the guilty party, by an absolute prohibition to contract a second marriage, even after the dissolution of the first ⁽²⁾.

This discipline was subsequently mitigated :

a/ In the first place, separation was no longer imposed for a spiritual relationship contracted *unconsciously* ⁽³⁾, or for baptism administered *in case of necessity* ⁽⁴⁾, or again, according to the most probable opinion, for a relationship contracted *maliciously* by one of the parties for the purpose of depriving the other of the use of marriage ⁽⁵⁾.

b/ Secondly, the clause prohibiting second marriages disappeared.

c/ Finally, the separation clause was also mitigated, if not by the ecclesiastical law itself ⁽⁶⁾, at least by the interpretation put upon it. On the analogy of the case incest, it was limited to prohibiting the solicitation of conjugal intercourse, and this prohibition applied only to the guilty party ; in this manner the rights of the innocent party were safeguarded, and provision made for the maintenance of effective cohabitation.

The ancient penalties still keep their place in the ecclesiastical law ; but that is about all ; for practical purposes they may be ignored.

THIRD PRINCIPLE. *Where one of the parties has full right and liberty to make use of the marriage, it may yet happen that the other*

1. Cap. 2, Causa XXX, question 1. This relationship is contracted when either of the parents baptizes their own child, or stands as sponsor for it in baptism or confirmation.

2. *Ibid.* ; and cap. 5, which treats of this question ; see also n° 242.

3. L. c., c. 6 ; also c. 2, X, IV, 11.

4. Cap. 7, causa XXX, 1.

5. Cap. 4 et 5, Causa XXX, 1, and especially cap. 2, X, IV, 11 : « Ideoque nobis videtur, ait Alex. III, quod sive ex ignorantia, sive ex malitia id fecerint (vir vel mulier contraxerint cognationem), non sunt ab invicem separandi, nec alter alteri debitum debet subtrahere, nisi ad continentiam servandam possint induci : quia, si ex ignorantia factum est, eos ignorantia excusare videtur ; si ex malitia, eis sua fraus non debet patrocinari vel dolus ». Cf. SCHMALZGRUEBER, o. c., where he refers to this, n° 46 s. ; FEYER, *De Imped.*, n° 245 s. ; WERNZ, o. c., IV, n° 498, and especially notes 81 and 85 ; SANTI, o. c., where he treats of this question.

6. All the texts of the *Decree*, in Causa XXX, say that it is necessary to proceed to separation ; also the decretal of Alex. III, quoted above. The *Rituale Romanum*, title II, c. I, n° 14, does not expressly speak of separation, but declares that spiritual relationship is an impediment to all use of marriage. It does not say a word of the prohibition of a second marriage.

party may have good and sufficient reason for refusing the marriage debt.

141.
Grounds of
exemption
from the mar-
riage debt.

Practically these reasons resolve themselves into the following: conjugal relations would cause one of the parties a **serious injury** or a notable **inconvenience**; however, there is no question here of a physical danger so great that the very fact of its existence would render sexual intercourse unlawful. In order to judge of the validity of these grounds of exemption it is necessary to take into account the persons and the circumstances; thus a more serious reason would be required for an absolute refusal than for merely deferring or restricting one's compliance.

The wife's want of strength, for instance, may not be a sufficient reason for a categorical refusal, but may be enough to justify a delay, or less frequent intercourse (¹). In like manner the *drunken* state of the husband, even though partial, seems quite a sufficient reason for the wife to defer rendering the marriage debt; for it must be painful to a self-respecting woman to give herself up to a drunken man, to say nothing of the possible consequences of this condition to the child, in the event of pregnancy (²).

A reason sufficient to justify an absolute refusal (so far as such reason does not suffice to make conjugal relations unlawful) is *the danger of contracting a contagious malady*, such as leprosy (³)

1. Notabiliter *immoderata frequentia* in debito petendo posset etiam esse ratio a reddendo excusans uxorem bene valentem, sed raro, cum aegre determinetur norma, quam variam proponunt varii Auctores, quacque variatur pro diversa corporum complexione. Porro non displicet regula quam suggerit *Die Ehe*, p. 119, quatenus, infra aetatem 50 annorum, passim non noceat sanitati copula bis repetita in hebdomada; ultra 50 annos, restringatur usus matrimonii et vix non absteineatur ab illo inde ab aetate 60 annorum. Caeterum, uti ibidem notatur, p. 118, experientia docet quatenus frequentia unicuique individue conveniat, prouti quis experiatur copulam corpori esse in refocillationem vel potius in fatigationem. Cf. etiam NYSTROM, o. c., p. 112 ss.

2. Cf. GREIDANUS, *Geneeskundig onderzoek*, p. 13.

3. Formerly reasons for exemption from the marriage debt were admitted only with the greatest difficulty. This severity is truly suggestive. Thus the decretal of Alex. III, chap. 2, X, IV, 8, decrees: « That if one of the parties is stricken with leprosy, and nevertheless demands the rendering of the marriage debt, the healthy party must comply with the general precept of the Apostle, and satisfy the other party. There is no sufficient reason for exemption ». See also ESMEIN, o. c., II, p. 12 s.

or syphilis (¹). The same must be said of the special risks that some women incur, who know from experience, or from what the doctor has told them, that every *confinement* will mean for them the danger of death.

As regards ordinary risks, the train of hardships and annoyances inseparable from pregnancy and motherhood, affords no sufficient reason for refusal ; nor the number of children, nor the consequent material embarrassment, apart, perhaps, from the case where the household is threatened with dire and chronic want, and the husband has little or no care for the well-being of his family.

Note. 1. Where a sufficient reason for exemption exists, the obligation of *justice* ceases. If, however, conjugal intercourse is still lawful, the obligation of *charity* may make it imperative, especially when it is a question of saving the other party from incontinence. We have already spoken of this above, n° 131.

The confessor ought to keep these different points in view (²).

2. Apart from the recognised causes of exemption, there are circumstances in which it is *equal* that husband and wife should show consideration for one another. It would be very unkind for the husband especially always to insist on his right. He ought to keep himself in check, and make a point of showing his wife a disinterested affection, particularly when she is indisposed, and during her pregnancy and confinement (³).

His love for her ought to suggest such a course, which cannot fail to increase her love and affection for him. See below, n° 336.

1. Cf. *Pr. Quartalschr.*, 1910, p. 853 s., where it is stated that the danger of contagion in case of syphilis varies with the phases of the malady. It is for the doctor to decide. The same article observes that the German law relieves the doctor of the obligation of professional secrecy, as far as concerns a consort who is menaced with grave danger of contagion from the other party.

2. *Prudenter igitur se gerat confessarius ne incaute excuset conjugem ab omni obligatione, ubi sola deficit obligatio justitiae. Ceterum, etiam ubi deest quaevis obligatio, prudenter silebit nonnunquam vel et suadebit reddendum debitum, quando secus praevidentur graviora mala.*

3. It is desirable, apart from the danger of incontinence, that relations should be suspended during the last three months of pregnancy, out of regard both for the wife and for the foetus. After confinement, the same rule should be observed for six weeks more. See above, n° 134.

Scholion I. CONJUGAL RELATIONS IN A DOUBTFUL MARRIAGE.

142.
Relations in
a doubtful
marriage,

If the validity of the marriage is doubtful, it is necessary to inquire into it, and in the meantime to abstain from seeking conjugal relations, but not from submitting to them. If after inquiry the doubt remains, but the validity is nevertheless probable, as a general rule, use may be made of the marriage just as if there were no questions of its validity.

Explanation.

1. Before the doubt is removed, conjugal relations cannot be *solicited*, because no one has right rashly to expose himself to the sin of fornication. Nevertheless the party in doubt may and ought to *satisfy* the party who is not in doubt, so as to avoid injuring that party's rights. If the doubt is shared by both, the case is different.

2. If after inquiry, *the doubt remains, but the validity is nevertheless probable*, the parties may avail themselves of this probability, and therefore, *as a general rule*, freely make use of the marriage. There is here no reason why the theoretical probability should not pass into practical certainty, since the lawfulness of the act alone is in question.

We say, *as a general rule*; for we must except, in the first place, the case in which the doubt is publicly known, and to continue living together would involve great danger of scandal (¹). In the second place, we must except the case of a marriage that is doubtful on account of a previous union that is probably still in existence. Under such circumstances the question of the right of the first husband or first wife, whose decease is doubtful, comes in. In this case:

contracted in
bad faith,

a) If the newly married parties have *both* contracted marriage *in bad faith*, that is to say, with knowledge of the doubt in question, they can neither ask nor render the marriage debt, and they must separate. For then, owing to their bad faith, their contingent right must yield to the right of the first husband or wife probably still living.

or in good
faith.

b) If they have *both* married *in good faith*, then by that very fact their right holds good, and they can make use of the marriage.

1. We will give an example of this later, in n° 300.

c) *If one of the parties only was in good faith* at the time of the marriage, that party alone can act without restraint; for the reason already given, the other party cannot solicit conjugal relations, but may and ought to satisfy the party in good faith, whose claim is consequently good (1).

Scholion II. ONANISM.

Below, towards the end of the second part of this work, in nos 330 and the following, we shall professedly speak of the duty of the parish priest and confessor, to instruct those about to marry and those already married, with regard to the use and abuse of marriage. We think, however, that it is desirable to make here some special observations on the subject of *onanism*; for, among the sins of married people who go astray in the use of marriage, none is greater, and, unfortunately, none of more common occurrence.

I. Its meaning.

Onanism is understood in different ways :

143.
Meaning of
onanism,

1. *Onanism strictly so called* is the *copula* had *in vase debito*, but with *complete* withdrawal before semination, so that the seminal fluid is effused *extra vas*. It derives its name from Onan, the son of Juda, who, as we read in *Gen.*, XXXVIII, 9, 10, committed this crime.

2. *In a wider sense*, it is the *copula* had *in vase debito*, and effected *its varieties*, *without withdrawal*, but with the employment of various artifices to prevent proper impregnation. These are : a/ the little cloth of fine fabric (vulgarly known as a *condom*) wrapped round the penis, and serving as a receptacle for the seminal fluid ; b/ the *pessarium occlusivum*, « by which is meant a small instrument introduced into the woman's vagina, near the orifice of the uterus, to prevent the seminal fluid from entering it » (*ABRTNYS, Fasciculus*, p. 88) ; c/ the *siphunculus*, used immediately after copulation to wash the

1. The Instruction of the S. C. de P. F., in 1792, gives the same solution : « Si qui jam nova conjugia contraxerunt, et quidem in bona fide existimantes se per interitum conjugis a priori conjugii vinculo absolutos, relinquendi sunt in bona fide... Si eorum alter dubius et anceps est, reddere quidem debitum potest, non autem petere. Si denique uterque mala fide contraxit, jam sunt omnino separandi ». *Collectanea*, n. 1366. Cf. case solved by SICA, o. c., p. 427 ss.

seminal fluid out of the vagina (this artifice is commonly called in French « moyen de propreté »); d/ the powder, called *poudre anticonceptionnelle*, which is blown into the vagina before coition, in order to destroy the spermatozoids: a pastille, called from its object *spermathanaton* is, in like manner, introduced into the vagina for the same purpose (¹).

Sometimes, by an abuse of the term, the *copula* effected with *incomplete* withdrawal, so that the seminal fluid is not spilt, but deposited in the opening of the vagina, is called onanism (²).

The practice of onanism is not uncommonly designated *Neo-Malthusianism*, inasmuch as it is a debased application of the theory put forward by Malthus in his *Essay on the Principle of Population* (first ed., 1798). In order to restrict what he considered the excessive propagation of the human race, Malthus recommended continency in the married life, and especially the postponement of marriage, as a means of diminishing the number of children (³). The supporters of onanism seek to attain the same end by inducing married people, not to abstain from the use of marriage, but to make an unnatural use of it (⁴).

1. See the description of these practices in FOREL, o. c., p. 469-474; cf. also KNOCH, *L'Onanisme conjugal et le Tribunal de la Pénitence*, p. 23 ss.

2. What is known to the theologians as masturbation, is often spoken of by medical men as onanism. Cf. GEMELLI, o. c., p. 70.

3. Cf. CARD. MERCIER, *Lettre Pastorale*, p. 423 ss.; *Vie diocésaine*, 1911, p. 191 ss.; VERMEERSCH, *La Peur de l'Enfant*, p. 11 s., and more at length CASTELEIN, o. c., p. 601 ss.; *Le Mouvement de la population et le Malthusianisme*; GREIDANUS, *De Leer van Malthus*. In these works the argument that the Neo-Malthusianists, following the example of Malthus, bring forward, of the danger of excessive prolificacy, is refuted.

4. Widespread is the name of *prophylaxie conceptionnelle*, and the introduction and propagation of this practice is increasingly advocated by societies established for the purpose, by daily papers and by magazines. Cf. PAQUET, l. c., p. 265 s.; *N. R. th.*, 1911, p. 596 ss.; LEMOZIN, l. c., p. 782 s. In this same direction of onanism tends also the not uncommon practice of *ovariotomy* or *vasectomy*. Vasectomy, in the case of the man, consists in making an incision in the scrotum and severing the vas deferens or duct that conveys the seminal fluid, produced by the testicles, to the seminal vesicles, and so preventing its issue. In the case of the woman (when it is known as *oophorectomy* or *fallectomy*), it consists in the severing of the oviduct, or duct that leads from the ovaries to the matrix and conveys the mature ovula. Dr MALLEY describes the surgical operation, in the *Eccles. Review*, t. XLIV, p. 684 ss.

II. Its malice.

The *essential inordinacy* of onanism consists in this, that it is directly opposed to the purpose of the Creator, in making the copula carnalis a means for the procreating and informing of offspring. Hence it is a *sin of luxury against nature*, and a most grievous one, since it concerns a matter of the greatest moment, on which the whole framework of society may be said to rest ⁽¹⁾.

144.
its malice.

This malice is *intrinsic* to the act, so that no reason, however urgent, can excuse it ; nor does the married state remove the malice, for, though the conjugal bond makes lawful the sexual intercourse of married people, it does so only when such intercourse is *per se* rightly ordered for the purpose of generation ; and this is the only sexual intercourse that husband and wife acquire a right to in respect of one another.

In addition to this essential inordinacy there is the *grave injury* that threatens those who practise onanism, more especially the wife : both from the fact that, on the excitation of the sexual organ-ism, the natural complement, the reception of the male seed, is violently withdrawn ⁽²⁾, and also from the lesion which easily follows on the use of various onanistic contrivances, such as the *pesarium occlusivum* ⁽³⁾. Most deplorable are the consequences that

1. This does not apply to the practice mentioned above as being wrongly called onanism. This practice is not *contra naturam*, since it does not prevent generation, but is *præter naturam*, and induces a slight inordinacy, that may be excused where there is some little reason for it.

2. Cf. ESCHBACH, *Disputationes*, p. 573 s. ; SURLEED, *La morale dans ses rapports*, t. I, p. 192 : « Les excitations répétées de l'utérus, sans conclusion naturelle, amènent les troubles les plus graves de cet organe (métrites, déviations, tumeurs, etc.). D'autre part, la vie purement sensuelle, privée de repos et de détente, ébranle à la longue le système nerveux de la femme et la conduit aux troubles variés de l'hystérie, et quelquefois au désastre de la folie ». Also DESPLATS, o. c., p. 42 ss.

See PINKHOF, *Pro et Contra*, p. 25 ss., where he enumerates the various physiological and moral disorders following on the practice of onanism. Cf. also KOUWER, o. c., p. 18, where he declares that the practice of onanism is at the very least anti-physiological, and that consequently there is good reason for fearing that it is injurious, though this may, perhaps, be incapable of scientific proof. NYSTRÖM, o. c., 167 and 281, acknowledges that onanism, strictly so called and effected by withdrawal, is injurious, but denies that it is so, where the little cloth or other contrivance is employed.

3. Cf. DR. DAMEN, o. c., p. 113 s., where, in opposition to Treub, he maintains

follow in the increase of abortion and fornication ⁽¹⁾, and in the decrease of population in countries where this abominable practice prevails ⁽²⁾.

Onanism is severely reprehended in Holy Scripture ⁽³⁾, and has been repeatedly condemned by the Holy See ⁽⁴⁾.

the existence of this danger, not indeed from the actual use of the *pessarium*, but, as frequently happens, from its faulty application. On p. 109 s., the same writer solves the objection that is raised against the Catholic doctrine on the score of excessive increase of the human race.

1. Experience teaches us that with the spread of Neo-Malthusianism there is an increase of abortion. Thus at Liège, in Belgium, where this doctrine is very widespread, Dr. Dejace tells us that one out of every three cases of pregnancy is terminated criminally; cf. also *N. R. th.*, 1911, p. 601. There is also an increase of fornication, owing to the lessened fear of pregnancy. See FORSTMANN EN AUSEMS, o. c., p. 59 ss.; PINKHOF, l. c.; GREIDANUS, *De leer van Malthus*, p. 26 ss.

2. Cf. *Etudes Religieuses*, t. XCIII (1898), p. 111 ss.; *Réforme sociale*, t. XXXI (1896), p. 338 ss. In the latter is given a statistical account of the families of La Parade, in France: « La commune compte 170 ménages réguliers... et ces 170 ménages se décomposent ainsi : ménages sans enfants, 48 ; ménages ayant 1 enfant, 80 ; ayant 2 enfants, 18 ; ayant 3 enfants, 16 ; ayant 4 enfants, 6 ; ayant 5 enfants, 1 ; ayant 7 enfants, 1 ; ces 170 ménages ont 248 enfants, ce qui met la moyenne des enfants au-dessous de 2 par ménages ». Further on he adds: « l'histoire démographique de La Parade est celle de la plupart des localités de la région (département de Lot-et-Garonne) ». See also COPPENS, o. c., p. 100 ss., where may be found evidence as to this vice in America at least in heterodox families: « c'est un fait, la famille américaine qui a plus d'un ou de deux enfants est une exception »; BUREAU, *La crise morale des temps nouveaux*, Paris, 4th ed., p. 53-63; DESPLATS, *De la Dépopulation par l'Infécondité voulue*, Annales de la Société scientifique de Bruxelles, 1907-1908, Supplément. Finally, see Card. MERCIER, o. c., near the beginning; KNOCH, *L'Onanisme*, p. 4 ss., where various statistics are given; PAQUET, l. c., p. 258 ss.; LEMOZIN, l. c. p. 771-777; *Archiv für k. Kirchenr.*, 1912, p. 155-163.

3. In *Gen.*, XXXVIII, 9, 10, we read that Onan, « when he went in to his brother's wife, spilled his seed upon the ground, lest children should be born in his brother's name. And therefore the Lord slew him, because he did a detestable thing ». From the text and context, however, it would seem that the blame of the sacred writer applies directly and formally to the wrongful frustration of the law of the levirate, intended by Onan, rather than to the spilling of his seed.

4. The C. S. O., 21 May 1851, in answer to the first proposition: « for good reasons married people may use marriage as Onan used it », declared the proposition to be « scandalous, erroneous and contrary to the natural law of marriage ». Cf. also the same declaration ad 2^m, in the *N. R. th.*, XVIII, p.

III. The duty of the confessor (¹).

A. The duty of questioning.

145.
Duty of the
confessor :

If married persons make no mention in confession of sins committed in the use of marriage, and in particular of onanism, and there is no special reason for suspecting this vice, they are not to be questioned, except in a general way as to the proper fulfilment of the duties of their state of life ; and the confessor will do well to refrain even from such a general inquiry in dealing with penitents, who from their confession or otherwise are evidently strangers to this vice.

But if after taking into consideration the penitent's state of life and other evidences, a prudent judgment points to a well founded suspicion of onanistic practices (²), *as a rule*, the confessor is bound to make a closer examination and press his questions with greater insistence : « it may be asked, v. gr., if the penitent has led a truly Christian life in the married state ; or if there is any trouble of conscience with regard to the marriage duties ; or in general it would be better to ask even more explicitly, if the penitent conforms to the Divine will as to the number of children, or trusts entirely to Divine Providence with regard to the generation of offspring (³) ». This

537. To the question : « is the imperfect use of marriage, whether onanistically or condomistically effected, as in the case, lawful », it replied, 19 Apr. 1853, « No, for it is intrinsically evil ».

1. For the office of the *parish priest* in this matter, we refer the reader to nos 334 ss., where we professedly speak of the duty of the parish priest in dealing with married persons. In the same place we shall explain the general principles, also applicable here, which govern the office of the confessor with relation to married persons and those about to marry.

The duty of the parish priest and confessor is laid down in the *Instructiones contra vitium onanismi*, put forth by the Bishops of Belgium for parish priests and confessors in 1909.

2. « This well founded suspicion will more readily exist if the penitent leads a worldly and indevout life, and confesses other grave sins against chastity... if there is rare and very rare approach to the sacraments, especially if this evil practice is very prevalent in the locality. On the other hand there will be less reason for fear, if the penitent already has a numerous family, confesses each and every sin with great care, and frequently approaches the sacraments ». *Collationes Tornacenses*, 1910, p. 411.

3. *Instructiones* l. c., p. 458. Cf. KNOCH, *L'Onanisme Conjugal...*, p. 32 s. But where peculiar circumstances advise greater prudence, and it seems necessary

doctrine is confirmed by the utterances of the Holy See (¹).

We say, *as a rule* : because it may happen *exceptionally* that married people are in good faith in this matter, and that it is expedient that the confessor should leave them in that state.

Good faith may exist, though rarely and here and there for a brief period only ; for, the intrinsic inordinacy of onanism, involving as it does a sin against nature (*), does not easily escape notice, especially at the present time when the malice of this sin is so strongly insisted on, and its deplorable results are so plainly apparent. Where there is good faith, and where it is not likely to be forthwith disturbed, the confessor may sometimes refrain from questioning the penitent, namely, when he has good reason to fear that his questions and advice would produce no good result.

This departure from the general rule, however, must be made with prudence and reserve, and the fear of the penitent's unrea-

to proceed more cautiously so as to avoid offending the penitent, a spontaneous confession may be elicited by counselling the married person to observe faithfully the laws of married life, to ask God's blessing on present or future offspring and to take solicitous care of the same as a divine trust.

1. Thus the reply of the S. Penitentiaria of 10 March 1886 to the first question : « When there is a well founded suspicion that a penitent who maintains a complete silence on the subject of onanism, is addicted to this vice, is it lawful for the confessor to abstain from a prudent and discreet questioning, because he foresees that many will be disturbed in their good faith and forsake the sacraments ? — or is not the confessor rather bound to put prudent and discreet questions ? », was : « *as a rule*, negatively to the first part, affirmatively to the second part ».

The *N. R. th.*, XVIII, p. 359 ss., gives the full text ; on p. 537 may be found the declaration of the C. S. O., of 1851, of which above, ad 3^m, deciding that the proposition, according to which « it is never expedient to question married people of either sex on this subject, even if there is a reasonable fear that they, whether husband or wife, abuse marriage », is « false, excessively lax and dangerous in practice ».

2. « En effet ce péché met l'époux en opposition flagrante, directe et radicale, avec la fin première et principale du mariage : la procréation de l'enfant, l'existence et le développement de la société humaine. Engagé dans le mariage, placé dans des conditions normales d'intelligence et de discernement, un homme, à moins de fermer volontairement, obstinément, les yeux à la lumière, ne peut se méprendre sur l'obligation primordiale, de droit naturel, qu'implique l'exercice des rapports conjugaux ». KNOCH, l. c., p. 28, where, and on the following page, he treats very well of the good faith that exceptionally exists, and of the causes from which it may arise.

diness to obey must not be merely imaginary. Even where it is quite evident that the penitent will not prove amenable, it is often better to make the inquiry : because, quite apart from the fact that the state of good faith cannot last for long, there is the danger, especially at the present time, when these matters are receiving so much attention, that the confessor's silence may be mistaken for tacit approval both by the penitent himself and by those who come to hear of it. This would be very detrimental to the public good.

B. The duty of **admonishing and instructing**.

As regards married persons whom the confessor knows, either from their spontaneous statement or from prudent questioning, to be addicted to the practice of onanism, the hypothesis is twofold : either it is a case of a *wife* with an onanist husband, with whom *she co-operates merely materially* ; or it is a case of married people who *knowingly and wilfully practise onanism* ; exceptionally it may happen that one or the other of them may be in good faith and look upon the practice as lawful : the penitent indeed mentions the matter in confession, but does not accuse himself of it as of a sin, because he thinks there is no evil in it, or believes that it is excusable.

146.
2o to admonish and instruct :

The *first* question, therefore, is, whether married persons, who are found in confession to be given to the practice of onanism, are always to be admonished of the gravity of the sin, even when they are in good faith. The *second* question is, how are wives who merely co-operate in onanism to be instructed.

In answer to the *first question* :

Married persons, *who tell their confessor in confession that they are addicted to onanism*, must be most severely admonished of the exceeding gravity of that sin, in accordance with the rule inculcated by the Holy See itself (¹).

a) married persons practising onanism ;

1. The S. Penitentiaria, 10 March 1886, l. c., in answer to the second question, « whether a confessor who learns, either from spontaneous confession or from prudent questioning, that his penitent is an onanist, is bound to admonish him of the gravity of this sin... and to reprehend him with paternal charity, and to give him absolution only when it is made certain by sufficient signs that the said penitent is sorry for the past, and has the purpose of not acting onanistically for the future », replied : « *In the affirmative*, according to approved authors ».

This rule is absolute, and admits of no exception, whenever the confessor is directly asked about the morality of the said act, or when the penitent is in doubt about it.

But if it is a question of a penitent who in good faith thinks that it is lawful for him, and there is no hope that the admonition would be of any effect : looking at the matter in the abstract, it may be in strict law permissible, in this hypothesis also, to leave him in good faith ; but practically, and taking the matter in the concrete, there can never, or hardly ever, be good ground for taking such a course.

Indeed, the reasons that we have given under A, against keeping silence and refraining from putting questions, are of the greatest cogency here ; for, in this case the silence of a confessor who does not condemn the act, when it is equivalently submitted to his judgment, amounts to approval, and there is very great reason to fear that such silence would become a matter of common talk, with the most deplorable consequences to public morality (¹).

Taking all this into consideration, we are of opinion that the practice, set forth in the *Instructions* of the Belgian Episcopacy, is to be interpreted and applied strictly, viz., that *in exceedingly rare cases* it is lawful to leave in good faith a penitent who is found in confession to be addicted to this vice. It is to be further observed that the *Instructions* permit this only under the condition, which is scarcely ever fulfilled, that here is no danger of the confessor's silence being noised abroad. There is the greater necessity to insist on this strict interpretation, as confessors for the most part are inclined to take the more lenient view (²).

This rule had been already set forth by the S. Penitentiaria, 14 Dec. 1876, (see *N.R. th.*, XVIII, p. 536 ss.), where it teaches that a confessor does not satisfy his obligation, who, « when a penitent merely accuses himself of onanism, maintains a complete silence, and, when the confession of sins is finished, in general terms excites the penitent to contrition, and, on his assurance that he detests every mortal sin, gives him absolution ».

1. « Ce silence ne restera pas longtemps le secret du confessionnal. Nombre de pénitents, soit bavardage, soit désir de s'excuser, en saisiront leur entourage : l'erreur s'accréditera, la contagion fera de nouvelles victimes ». KNOCH, o. c., p. 35. Cf. also VERMEERSCH, *Un grave péril*, p. 43.

2. Therefore, as we have just said above, never or scarcely ever would there be room for the silence of the confessor in this matter. And indeed such and so great a good may be looked for from the uniform severity of all confessors in

In answer to the *second question* :

The following rules for instructing and admonishing *a wife who materially co-operates* in onanistic intercourse ⁽¹⁾, are to be applied as occasion offers :

b) a wife co-operating in onanism ;

1. A wife is *never bound* in justice to render the marriage debt to a husband seeking intercourse that is onanistic in any way whatever. The reason is that, according to what we have said above, she has not yielded power over her body except for the purpose of sexual intercourse that is of itself apt for generation.

2. She *is not allowed* to render the marriage debt to a husband who solicits her to have intercourse with him *condomistically*, using the little cloth or wrapper ; for that would be immediate participation in an act intrinsically evil, as being inordinate.

It is, therefore, the duty of the woman in question to offer positive and physical resistance to the best of her ability, just as a girl must resist the attempt to seduce her : « only for the *gravest* cause, namely for the fear of death, or of some like evil, would it be lawful for her not to resist her oppressor » ⁽²⁾.

condemning this crime, when discovered in confession, that it seems right to ignore altogether the very rare case in which, for the good of the individual, it might perhaps be passed over in silence. On the part of one or two penitents, perhaps, this greater severity might occasion a neglect of the sacraments which, by an indulgent silence, might have been deferred for a time ; but, on the other hand, it will exert a most salutary influence on the faithful as a whole, and, when there is no longer any discrepancy in the practice of confessors, it will bring all to an intimate conviction that onanism is to be condemned without mercy and that no terms can be made with it. « Ce à quoi il faut arriver, c'est que l'on sache que le prêtre, non pas vous tout seul, mais tout prêtre, l'Eglise enfin, tient pour péché grave l'onanisme. Là-dessus viendra encore à confesse qui voudra, mais au moins ceux qui y viendront avec sincérité seront prévenus qu'ils auront à s'accuser de cette misérable pratique et à s'en abstenir. Les gens de foi et de religion chancelante pourront désertir ; les chrétiens resteront ». *Collat. Tornac.*, l. c., p. 413, according to the *Ami du clergé*.

1. We therefore preclude from the case in which the woman herself employs some preservative instrument, such as the pessarium occlusivum, or injects some liquid or powder to destroy the spermatozoids ; we preclude also from all consent to onanistic intercourse, and from all incitement to the same, whether direct, or indirect by complaints about the number of children, the danger of childbirth etc. ; for, this would be formal co-operation, and the principles already given above apply to it.

2. Thus the *Instructions*, p. 459 s. Cf. VERMEERSCH, *Un grave Péril*, p. 9 ; KNOCH,

3. If she knows that her husband intends to have intercourse *with withdrawal*: a/ she can render the debt for a *grave* cause, and with due precautions; b/ she can seek the debt, but only for a still *graver* cause.

The fact that for a grave reason *she can render* the debt, arises from this, « that in the case proposed, the woman on her part, does nothing that is contrary to nature, and assists in that which is lawful, while all the inordinacy proceeds from the malice of the husband, who, instead of consummating, withdraws and effuses *extra vas* » ⁽¹⁾: thus her cooperation is not immediate, but only mediate, from which a grave reason excuses: while charity, which would require the wife to prevent her husband's sin, does not bind when the contingent inconvenience is so great.

That a *grave cause* is required, follows from this, that *for the mediate co-operation*, strictly so called, in the husband's sin, there is required a reason that compensates for the evil effect in which the wife co-operates: viz. it is, in truth, an unseemly act (*actio male sonans*), and its inordinacy must be counterbalanced by some proportionate cause ⁽²⁾.

A sufficient cause is: « if the denial of it (the debt) would be resented by her husband, and she would have reason to fear grave inconvenience to herself therefrom » ⁽³⁾. *Responsum S. Penitentiariae*, 15 Nov. 1816, l. c.

o. c., p. 44, where is quoted the decree of the C. S. O., of 19 Apr. 1853, in which to the doubt: « Can a wife, with knowledge of the fact, remain passive in condomicistic intercourse? », an answer is given: « *in the negative*, for she would then be assisting in a thing intrinsically evil ».

1. Reply of the S. Penitentiaria, of 23 Apr. 1822, in the THEOL. MECHL., o. c., p. 140 s.; compare with reply of the same S. Penitentiaria, of 15 Nov. 1816, l. c., and in the *N. R. Th.*, t. IX, p. 326.

2. The principles concerning co-operation which are applied here, are explained by the Right Rev. Mgr. WAFFELAERT, *Etude de Théologie morale sur la coopération*, Bruges, 1883, p. 1-13.

3. « But then... the wife would undergo grave inconvenience: 1/ if there is reason to fear death, blows, or serious acts of cruelty, which must be judged from the circumstances of the parties concerned...; 2/ if there is a well founded fear that the husband will keep a concubine in the house and live with her in marital relations, or even make a practice of visiting her elsewhere, or consort with prostitutes; 3/ if she knows for certain that her husband, angered by a

The *precautions* to be taken are : a/ to remove scandal, by protesting before her husband, as far as circumstances permit, against the commission of so great a crime ; b/ that she should not, either directly or indirectly, incite her husband to onanism, but should, with all the earnestness she can, endeavour to turn him from such a sinful act, and should moreover detest the act itself and in no way consent to the intercourse in so far as it is onanistic, nor to delectation in it *as such*, although she may take pleasure in the intercourse itself, and even in its result, while detesting the cause.

That a *graver* cause is required for *seeking* the debt is evident, since to the co-operation in the restricted sense, which is found in the rendering of the debt, there is added co-operation in the wider sense, since by her solicitation the wife influences her husband to an intercourse which she foresees will be onanistic. Such a cause would be the imminent danger of incontinency.

« Even in this case », as the *Instructions* tell us, « the tendency must be rather in the direction of severity than of laxity in her regard, lest the result should be that, while men are denied the sacraments, by a subtle distinction women who indulge in onanism are freely admitted to them ».

C. The duty of remedying.

1. *Insist on the gravity of the sin* : showing how, on the lines of ^{127.} 30 to remedy, what we have said above, an act of luxury against nature is committed, and the end appointed by God directly defeated (¹).

2. *Refute the pretexts* : which « may be well reduced to two kinds : some people are unwilling to take upon themselves the burden of a numerous family (²), and others wish to spare the wife the

repulse, will break out into blasphemy against God and religion, and say scandalous things before the servants and children ; 4/ if there is reason to fear quarrels, disputes and frequent dissensions... ». *N. R. Th.*, IX, p. 326.

1. VERMEERSCH, *Le Problème de la Natalité*, p. 50 ss., argues very well against those who would deny this teaching of theology.

2. If they allege as a pretext too numerous a family, or poverty, excite great confidence in the fatherly Providence of God, that has a care even for the birds of the air ; and bid them beware lest they turn the blessing of Providence into a curse.

« Appeal should also be made to the fact, confirmed by daily experience, that large families are, generally speaking, the happiest ; for in them the natural

dangers of pregnancy and especially of childbirth » (1). *Instr.*, p. 455.

3. *Inspire a salutary fear* : by speaking of the Divine vengeance that onanists bring down upon themselves by this unnatural vice (2). Incite this salutary fear especially in those who, influenced by their egoism, outrage the laws of nature in order to escape the burden of children ; and in those who « should fear lest they may some time have to undergo a harder and more trying experience, since excessive fondness for the children that they have, often makes the objects of such ill-regulated affection the instruments of God's vengeance, even in the present life » (3).

4. *Do away with the causes* from which onanism comes, especially the materialistic view of life and effeminacy of will, by giving married people a higher conception of marriage, and by exhorting

energies of their members find full scope, and a more complete unanimity and a manly affection are supreme ». *Instruct.*, p. 456 ; cf. *Epistola Pastoralis Card. Mercier*, p. 420 ss. ; VERMEERSCH, *La Peur de l'enfant*, p. 41.

It is, besides, an established fact, « que le mouvement de la natalité est généralement en raison inverse de l'aisance ». PAQUET, l. c., p. 262 s.

1. « In respect of those who fear that another confinement may prove fatal to the wife, it may be answered, in general terms, that some doctors are too ready to say that there is danger of death from childbirth ; moreover, that obstetrics and surgery have made such progress at the present day, that almost all danger of death may be provided against by the employment of proper means ; that, on the other hand, voluntary sterility procured by the practice of onanism is not without injury to health ; that if after all there is real danger, they must either take the risk, or avoid it by the observance of continency. Those who are in this unfortunate position have, indeed, need of Christian fortitude ; but in this way they will lay up for themselves a weight of glory by their acts of temperance, instead of preparing for themselves remorse of conscience and a debt of punishment ». *Instruct.*, p. 456. Cf. also DESPLATS, o. c., p. 45 s., and compare with p. 40 s., where he points out the salutary effect that even repeated pregnancy produces in a woman.

2. The best known example is the terrible chastisement of the human race by the waters of the flood, in punishment of the sin of luxury against nature (« for all flesh had corrupted its way upon the earth ». *Gen.*, VI, 12) ; the punishment of Sodom and Gomorrha is another example.

3. *Instruct.*, p. 456 s. It may also be prudently alleged « that the means they employ are not infallible in their effect ; whence suspicions of infidelity, estrangement, and the like may arise ». *Ibid.*, p. 456 s. It is also sometimes well to appeal to the evil physiological consequences, of which we have spoken above. Cf. *Lettre Pastor. Card. Mercier*, p. 415 ss.

them to the strenuous exercise of Christian manliness and the moderate enjoyment of pleasures (1).

5. According to the reply of the S. Penitentiaria, 16 June 1880, it may sometimes be cautiously suggested to the penitent to make use of marriage only *tempore ageneseos* (2): but this advice must not be given indiscriminately, nor as a *certain* means for avoiding fecundation (3).

Quinimo non videntur reprobandi confessarii, qui, in desperatis adjunctis, per modum ultimi effugii, permittunt conjugibus tanquam minus malum, ut copulam exerceant ea lege ut eam incoep-tam abrumpant ante seminationem, hanc cohibendo: supponitur utique conjugibus experientia constare, hujusmodi copulationem pro ipsis non æquivalere pollutioni (4).

Quodsi, omnibus remediis ac zeli industriis frustra exhaustis, non succedat confessario pœnitentem, malitiæ conscium, a praxi onanistica avertere, non remanet nisi ut dimittatur tanquam indispositus, absolute denegata.

Note. « Catholic doctors must consider their grave obligations in this matter, and be careful not to exaggerate the danger of par-turition, but rather point out to the fearful how these dangers may be minimized » (5). They must endeavour by every means in their

1. It is especially the business of the parish priest to attack this vice, as occasion offers, in public and private instructions, as we shall say below, in n° 334, when speaking of the duty of the parish priest with regard to married persons.

2. The *tempus ageneseos*, as its name implies, is the time that is unsuitable for fecundation, viz., between the 14th or 15th day after the commencement of the menstrual discharge and the 3rd or 4th day before the following one.

3. On the one hand it cannot be denied that the copula effected during that period is physiologically more remote from fecundation, since the menstrual discharge is as a rule connected with ovulation. This is proved by experience, according to the computation made by BROUARDEL, o. c., p. 173. On the other hand, by way of exception, ovulation occurs outside of the times of the menstrual discharge, and may be provoked by the act of coition itself; the seed may also remain fecund for several days in the uterus; hence the efficacy of the remedy cannot be fully relied on. Cf. ESCHBACH, o. c., p. 81-84; CAPELLMANN, o. c., p. 138-140; N. R. Th. XXXI, p. 599.

4. Cf. supra, n° 127; *Collat. Brug.*, t. VII, p. 485 s., and compare with t. VI, p. 478.

5. *Instruct.*, p. 461. Cf. DESPLATS, o. c., where with great skill and care he states the duty of medical men in this matter. BOULE, *La responsabilité du médecin dans*

power to co-operate with the public authority ⁽¹⁾, and with private enterprise also ⁽²⁾, in combating this pestilent disorder, which men and women, and even medical men themselves, are not ashamed to disseminate by word and act ⁽³⁾.

ARTICLE 2. Care and education of the children.

148.
Right and
duty of
educating the
children.

I. **The right** that parents have, and **the obligation** that they are under of educating their children are deduced directly from the nature of marriage and from the end proper to it, which is no other than the work of generation and education.

The force of nature impels parents to show love and solicitous care for their offspring, and in like manner impels children to turn to their parents as their natural educators ⁽⁴⁾.

Now, if the business of education is not the concern of the parents, there is reason to fear that it will be neglected and the order of Providence subverted. It is futile to speak of it as the business of society at large, for a burden imposed upon all in general is borne by no one in particular; and it is illogical to look upon it as the duty of the State, for the State, as a civil

la prophylaxie anticonceptionnelle et l'avortement thérapeutique, in the *N. R. th.*, 1911, p. 591 ss.

1. Cf. *Lettre Pastorale du Card. Mercier*, p. 408, where are given the decisions of the Tribunals against the promoters of onanism; cf. also the decisions of 1 Aug. 1909 (Cour d'Appel de Pau), in *Pasicrisie*, 1909, IV, p. 44 s., and *Collat. Brug.*, t. XIV., p. 365 s.; likewise the decisions of the Courts of Liège and Brussels (in the case of Dr. Mascau), 18 Oct. 1909 and 26 Feb. 1910, in *Pasicrisie*, 1910, II, p. 171 ss. and 169 ss. Cf. *XXe Siècle*, 21 Oct. 1910, on the vigorous onslaught on pornography made by the Italian minister Luzzati. See also LEMOZIN, l. c., p. 788-794, and *Revue prat. d'Apolog.*, t. XIII (1912), p. 125 ss., where are given the various proposals of a law against depopulation laid before the French legislature, and of one already adopted in the United States of America.

2. Cf. LEMOZIN, l. c., p. 785-788, where he gives a list of some association started by private enterprise for the purpose of opposing the restriction of births.

3. Cf. KNOCH, o. c., p. 21 ss.; *Lettre Pastorale*, p. 407; SURBLED, *Autour du Mariage*, p. 8-12, where may be found the consultations of several doctors on this matter. Cf. also FOREL, o. c., p. 496 ss., where he shamelessly sets forth and describes the ways of making use of onanism; likewise NYSTRÖM, o. c., p. 269 ss. It is, however, a pleasure to refer to the Medical Congress held in Paris on the 7th of April 1910, when even freethinking doctors vigorously inveighed against the theory and practice of Neo-Malthusianism.

4. In this sense the Belgian civil Code, art. 293, declares: « Les époux contractent ensemble, par le fait seul du mariage, l'obligation de nourrir, entretenir et élever leurs enfants ».

society, presupposes the existence of a properly constituted domestic society, since it is made up of an agglomeration of families ⁽¹⁾. Thus, by a process of elimination, we see that the duty of education rests with the parents.

II. What education implies.

A. With regard to the **body** :

1. A soon as the child is *conceived*, it must be carefully preserved from injury, and every effort made to provide for its birth under healthy conditions. It is for this that the mother must, during the period of pregnancy, abstain from such occupations as are likely to bring about abortion or otherwise injure the child conceived in her womb. *What education implies with regard to the body ;*

2. When once the child is *born*, it must be properly nurtured ⁽²⁾ and cherished ⁽³⁾ ; the parents must carefully provide for its physical well-being according to their means and position, and both of them are bound to do their part therein.

3. Moreover, in proportion to their means, the father and mother are bound to make the child capable of supporting himself in the future, either by leaving him a fortune, by having him taught a trade, or by procuring for him the necessary instruction.

B. With regard to the **soul** :

1. *In the natural order* :

It is the duty of parents to labour constantly and with one accord for the intellectual, moral, and religious education of the child, to develop its intel- *with regard to the soul.*

1. « *Granted the intrinsic and essential end of the family, the education of the children is an immediate and natural necessity, and it is illogical to look upon the work of education as naturally belonging to a social institution that is posterior to the family, and whose very existence presupposes that of normally constituted families* ». MEYER, O. C., n° 106.

2. BENED. XIV, *De Syn. dioec.*, t. XI. c. VIII, nos 9 ss., declares that the mother is bound to suckle her own child, unless there be some sufficient reason against it, more especially a reason of health. « This is why », he says by way of conclusion, « the Bishop, in order not to be looked upon as an innovator, ought to refrain from publishing the precept of which we have spoken, but should rather earnestly beg ladies of wealth and position, who alone are in the habit of entrusting their babies to wet-nurses, to imitate the example of the holy women who suckled their own infants, as Sara suckled Isaac, and the Blessed Virgin Mary, Mother of God, suckled her Divine Son, Christ our Lord ». Cf. STOHR, O. C. p. 485.

3. Cf. GREIDANUS, *Geneeskundig onderzoek*, p. 27, 3 ; who expresses a wish to see a little book given to the newly married, teaching how to rear an infant, and to avoid all that may injure its health, even before birth.

ligence and to form its will. From its earliest infancy ⁽¹⁾ it must receive from its father and mother, both by word and example, lessons of virtue and morality ; they must inculcate hatred of sin and the fear of God, and with watchful care keep far from the child all that might sully its purity of soul ; they must provide for it religious teachers, and see that the servants to whose care they entrust it are honest and virtuous ⁽²⁾.

2. *In the supernatural order :*

Christian parents have to give their children an education fitting them alike for their natural and their supernatural end. Consequently they must instruct them in the practice of the Christian virtues and in the observance of the commandments of the New Law, under the direction of the Church established by Christ ; they must see that they duly frequent the sacraments, and, before all, that they are baptized without delay ⁽³⁾.

Note. 1. Education is a *common* work, the joint right and duty of the father and the mother ; nevertheless in this particular point, as in the general organization of the household, the husband takes the first place, and it is for him to say what is to be done.

2. It may, however, be asked if the whole work of education, natural and supernatural, belongs by *exclusive* right to the parents. On this point see MEYER, O. C., II, n° 107 ss. ; LECLER, in the *Coll. Namurc.*, t. IX, p. 152 ss.

1. St. FRANCIS DE SALES, *Introduction à la vie dévote*, Annecy, Niérat, 1893, p. III, ch. 38, exhorts parents to consecrate their child and offer it to God from the moment of its conception. Cf. *Coll. Brug.*, t. IX, p. 191 s.

2. Special prudence and tact are necessary in all that concerns the *sexual* education of the young. A number of modern works, widely circulated, advocate in this matter a course that is far too lax and daring. Such are the little volumes of the *Self and Sex* series, by Dr. S. Stall and Dr. M. Wood Allen, (with regard to them, see the decision of the S. C. of the Index, in the *Coll. Brug.*, t. XIII, p. 601 s.). The same applies to WILHELM, *Das Sexuelle Leben und seine Bewertung in der Erziehung der Kinder*, Donauworth, 1906, and to LEROY ALLAIS, *Comment j'ai instruit mes filles*, Paris, 1908, etc.

There are, nevertheless, works which, without being irreproachable in every respect, suggest counsel and advice useful to parents and teachers. Such are : FONSGRYVES, *Conseils aux parents et aux maîtres sur l'éducation de la pureté*, Paris, 1902 ; FOERSTER, *Jugendlehre*, Berlin, 1906 ; ERNST, *Elternpflicht*, Kevelaer, of which a Dutch translation, largely rewritten, has appeared under the title of *Ouderplicht*, Venloo, 1906. See also KNOCH, *L'éducation de la Chasteté*, Liège 1912 ; *Vie diocésaine, Documenta*, 1910, p. 56 ss.

3. Cf. Our article, *De Baptizandis nonnatis, abortivis et monstribus*, in the *Coll. Brug.* t. VIII, p. 492 ss. ; where the rules of prudence to be followed in cases of miscarriage and difficult confinement are given at length.

3. From our standpoint, *natural* parents of illegitimate children have rights and duties analogous to those of married persons, by reason of their position as father and mother ; there is, however, this difference that parents united in marriage have a double title in this respect, that of parents and that of husband and wife.

Scholion. Provisions of the civil law.

As to the **rights and duties** of parents **towards their children**, both legitimate and natural, the Code Napoleon, l. I, tit. 9, *De la puissance paternelle*, determines rather the rights of fathers and mothers than their obligations ; but we may remark that these rights are accorded to parents not in their own interests, but in those of their children, so that the jurisprudence looks upon these rights as actual duties. The following are the provisions of the Code Napoleon, in conjunction with those of the Belgian law of the 6 April 1908 :

149.

*Provisions of
the civil law*

A. Legitimate (or legitimated) children are by full right members of their parents' family, and are related to the kindred of their father and mother ; they have a right to be supported, cared for, and educated by their parents, that is to say, to receive from them their physical and moral education ⁽¹⁾, and they are their heirs ⁽²⁾, as well as the heirs of the relations of their parents, within the prescribed limits.

*as regards
legitimate*

B. Illegitimate children ⁽³⁾.

Preliminary observations. 1. *Simply natural* children a/ can obtain *acknowledgment* by their parents or by one of them, either by the spontaneous act of the father or mother ⁽⁴⁾ or by a judicial decision ⁽⁵⁾ given at the petition of the child or of its representatives, declaring that such a person is the father or mother of the child : this petition can only be made in the cases, and under the conditions named in the law ⁽⁶⁾. b/ Where they

*and illegiti-
mate
children.*

1. They have, at any age, the right to obtain support from their parents, if in need of it.

2. There is even one part of the inheritance which parents have no power to will away from their children.

3. We shall point out below, no 170, what is meant by legitimate, illegitimate, simply natural, and adulterine, as applied to children.

4. Art. 334 : « La reconnaissance d'un enfant naturel sera faite par un acte authentique, lorsqu'elle ne l'aura pas été dans son acte de naissance ». Observe that such acknowledgment may be opposed (a. 339), and that it profits the child only in respect of the person who has acknowledged him (a. 336).

5. « Le jugement qui déclare la filiation naturelle produit les mêmes effets que la reconnaissance ». Art 341c.

6. As regards *paternity* : in virtue of the law of 1908, art. 310a : « La recherche de la paternité est admise... 1/ s'il y a possession d'état d'un enfant naturel dans

have not been spontaneously acknowledged, and where judicial acknowledgment is not possible for them under the terms of the law, natural children, if they are not in a position to claim the title and rights of filiation, may yet establish a presumption of *natural paternity*, enabling them to claim an allowance for their maintenance and education until the completion of their eighteenth year, from the man who had relations with the mother ⁽¹⁾ during the legal period of conception », i. e., between the 300th and the 180th day before the birth, provided that the proof of these relations follows from one of the circumstances required by the law ⁽²⁾.

2. *Adulterine* and *incestuous* children cannot be legally acknowledged either by the spontaneous act of the parents (art. 335), or by a judicial decision ; for all legal proceedings are denied to them for this purpose (art. 342a) ; neither can they claim the allowance for maintenance provided for by the law of 1908 (same art.) ⁽³⁾.

les conditions prévues par l'art. 321 ; 2/ si, pendant la période légale de la conception il y a eu enlèvement par violence, ruse ou menace, détention, séquestration arbitraire ou viol ».

As to *maternity* : « La recherche de la maternité est admise 1/ s'il y a possession d'état dans les conditions prévues par l'a. 321 ; 2/ si l'accouchement de la mère prétendue et l'identité du réclamant avec l'enfant dont elle s'est accouchée sont rendus vraisemblables par un commencement de preuve par écrit conforme aux dispositions de l'art. 324, ou par l'énonciation de l'acte de naissance ». Art. 341a. For the inquiry into paternity and its relations with the new Belgian law of 1908, see LECLERCQ, o. c. ; CLAEYS BOÚAERT, o. c. ; PLANIOL, o. c., I, n° 1520 ss. ; *Rev. cath. du droit* 1908-1909, p. 277 ss. ; PASCRISIE, 1910, III, p. 379 s., and compare with GIGOT, *La Séduction et la Recherche de la Paternité*, in the *Réforme sociale*, t. 43 (1902), p. 189 ss.

1. It is accordingly necessary that the filiation should first be established on the mother's side.

2. Law of 6 April 1908, art. 340b, where the following clause is added : « La preuve de ces relations ne peut résulter que de l'une des circonstances suivantes : 1/ de leur aveu dans les actes ou les écrits émanés du défendeur ; 2/ de leur caractère habituel et notoire ; 3/ de l'attentat à la pudeur, consommé sans violence sur la personne d'une fille de moins de 16 ans accomplis ; 4/ de la séduction de la mère par promesse de mariage, manœuvres frauduleuses ou abus d'autorité ».

3. By art. 335 : « La reconnaissance ne peut avoir lieu au profit des enfants nés d'un commerce incestueux ou adultérin ». By art. 342a : « dans les cas où, d'après l'art. 335, la reconnaissance ne peut avoir lieu, l'enfant ne sera jamais admis soit à la recherche de la paternité ou de la maternité, soit à la réclamation d'aliments prévue à l'art. 340b ». Finally art. 342b adds : « les prohibitions des articles... 335 and 342a ne concernent pas les enfants nés de personnes parentes ou alliées, entre lesquelles le mariage pouvait être autorisé par dispense ».

This prohibition of legal acknowledgment must be understood in the following sense : children conceived in adultery or incest cannot be voluntarily acknowledged by their parents or by one of them, nor can they apply for a declaration of filiation whenever such acknowledgment or declaration would involve the manifestation of an adulterine or incestuous filiation (1) ; but it may happen in very rare cases, that, apart from any petition for acknowledgment made by the child, adulterine or incestuous filiation may be established as the consequence of a judicial decision, e. g., « where a marriage is annulled on account of incest or bigamy », and also in the case « in which an action for disownment is brought by the husband : if the judge decides that the child born of a married woman has not her husband for its father, the decision establishes an adulterine filiation ». CREMIEU, o. c., p. 178. Cf. CLAEYS-BOUUAERT, o. c., p. 282 s., as well as the decision of the Tribunal of Verviers, of 23 Feb. 1910, (in the *Pasicrisie*, 1910, III, p. 265 s.).

After these preliminary observations it will be easier to understand the provisions of the law with regard to natural or illegitimate children.

1. *Simply natural* children :

a/ For *acknowledged* natural children : the acknowledgment, whether voluntary or judicial, establishes relationship only between the child acknowledged and the father and mother who have acknowledged it, and not between it and the relations of the latter, saving what is said in articles 161 and 162 of the Civil Code as to the prohibitions of marriage, and the provision of art. 766 of the same Code concerning the succession of a natural child. Natural children are not even the heirs of their parents (art. 756 of the Code), they are only irregular successors, within the limits fixed by the law, in such a way that, in the terms of art. 908 of the Civil Code, they cannot receive from their parents, by gift during their lifetime or by will, anything beyond that which is accorded to them by law (art. 756 ss.).

On the other hand they are subject to paternal authority, and have towards their father and mother who have acknowledged them, the same obligations and duties as legitimate children (2).

b/ Those children to whom an alimentary allowance has been granted by

1. Filiation may be acknowledged or declared in respect of the father or mother, so far as such acknowledgment or declaration does not involve an adulterine or incestuous filiation.

2. Cf. CREMIEU, o. c., p. 81 ss.; but compare this with LECLERCQ, o. c., p. xxviii s ; and art. 337, modified by the law of 1908. In the new German Code, « an illegitimate child and his father are not reputed kin », art. 1589 ; on the other hand « in its relationship to the mother and the mother's relations it has the same legal position as a legitimate child », art 1705.

the judge, in virtue of art. 340b, have a *right* to « an annual allowance for their support and education until they are fully 18 years of age » ; beyond this alimentary allowance, they *may* in conformity with the common law receive free gifts from their parents ; in other words, they are not incapacitated by art. 908 of the Civil Code.

On the other hand, they are not considered in the eyes of the law as the children of him who has to pay their allowance, except as concerns the prohibitions of marriage, in the terms of articles 161 and 162 of the Civil Code.

c/ Outside these two classes, natural children are considered in civil law as strangers in respect of their parents, if they so much as know the authors of their being ; and they have no legal right to demand of them whatever it may be ⁽¹⁾. Naturally, like all strangers, they can profit by the provisions of the common law, and receive gifts or legacies from their parents. The provision of art. 908 does not affect them, and the prohibitions of marriage in art. 161 and 162 are not applicable to them.

2. Children whose *adulterine* or *incestuous* filiation happens to have been legally established, may demand support from their parents in virtue of art. 762 ; but considering the provisions of art. 908, applicable in the case, they cannot receive anything beyond, not even by way of gift ; in detestation of adultery and incest they are thus put outside the common law ⁽²⁾ ; they are nevertheless affected by the marriage prohibitions of articles 161 and 162 of the Civil Code. Cf. CRÉMIEU, *ô. c.*, p. 178 s.

Note. It follows from what we have just said that only natural children legally acknowledged are looked upon by the civil law as sharing in a full and entire filiation, and in all its legal effects with respect to their parents ; legal acknowledgment alone is admitted as proof of full filiation.

Nevertheless, in the case of art. 340b, it appears, as we have insinuated above, that the right of demanding an alimentary allowance, where the judge allows this right to a natural child, is based on a *presumption of filia-*

1. Observe that such children are not considered as the natural children of any one, notwithstanding the entries in the register of births. For, as it is said in the *Pasicrisie*, 1910, III, p. 243, « natural filiation exists only when established by acknowledgment. The registration of the birth of a *natural* child proves nothing beyond the birth of the child ; it does not prove its filiation ». Art. 319 of the Code applies only to *legitimate* children.

2. It follows from the preliminary observations in n° 2, that these exceptional measures are of very rare application, for it is very seldom that adulterine or incestuous filiation, as such, is legally proved ; in fact all children born of adultery or incest, but who are not legally acknowledged as such, are treated as simply natural children, according to the rules given under 1.

tion and paternity, in virtue of which, however, the child profits only by a partial legal effect. The payment of this allowance is not imposed by way of a punishment and penalty for the act of one who exposes himself to the risk of incurring paternity, as some pretend (*théorie du risque-paternité*), but rather in consequence of a presumption of really existing paternity. This is what justifies the provision of art. 340c : « le jugement qui condamne le défendeur au paiement d'aliments, en vertu de l'art. 340b, produit les mêmes effets que la reconnaissance, en ce qui concerne les empêchements de mariage ». Cf. LECLERCQ o. c., p. VI, XXXI ss., and XLV s.; CLAEYS-BOUÛAERT, o. c., p. 476 s.

ARTICLE 3. Cohabitation.

Conjugal cohabitation implies *community of roof* (*consortium tecti*), that is to say, community of table and of family life under the same roof, and this is cohabitation strictly so called. In addition to this it also includes *community of bedchamber or of bed* (*consortium tori*).

PARAGRAPH I. RIGHT AND OBLIGATION TO COHABITATION.

I. Community of roof.

The conjugal bond implies *of its nature and as a general rule* the right and mutual obligation to community of family life under the same roof. This flows directly from the right and obligation that parents have with regard to the education of their children. As we have said above, this moral and religious as well as physical education requires the common constant care and exertion of the father and mother. To conduct it properly, it is clear that it is not sufficient for the parents to be united by a social bond, if on the other hand they are living apart. It is necessary that they should have a common life and the lasting intimacy that springs from their relations with one another ; the work of education brings with it many anxieties, in which they need mutual assistance, comfort and support.

We have said that the conjugal bond implies this community of life *of its nature and as a general rule*. For, *accidentally* it may happen that the education is properly assured, even though the parents live apart ; but in accordance with the principle that we have invoked above, in a matter of obligation it is necessary to

150.
Right and
obligation

10 to commu-
nity of roof ;

consider things as they ordinarily are, and not exceptional cases that may accidentally occur.

In addition to this, their natural inclination leads husband and wife to live together ; and they have constant need of one another in their daily life.

It is in this sense that we ought to interpret the words of *Gen.* II, 24 ; « Wherefore a man shall leave father and mother, and shall cleave to his wife ».

The *Code Napoléon* also recognises and enforces this cohabitation of married people, art. 214 : « La femme est obligée d'habiter avec le mari et de le suivre partout où il juge à propos de résider » (1).

Note. It is true that the right and obligation of husband and wife are mutual in this matter ; nevertheless, it belongs to the *husband* to choose the domicile, so that, as a general rule, the wife is bound to follow him.

We say : *as a general rule*, because it may happen that she is not obliged to do so ; e. g., a/ if the husband, without her previous consent, makes up his mind to lead a wandering life ; b/ if the journey would cause his wife serious injury ; c/ if the husband, without necessity, determines to go away to a very distant country (2).

II. Community of bedchamber and of bed.

151.
2o to commu-
nity of bed.

In the strict sense, the *consortium tori*, as it is called, is understood of community of bed, and this is the general usage ; in a wider sense it signifies community of bedchamber with separate beds.

1. On the practical way of compelling the wife to do so, see *Pasicrisie*, 1907, IV, p. 53 s., where the case of a husband who demanded that this wife should be brought back to the conjugal domicile by military force, is decided. Cf. also PLANIOL, o. c., I, n° 894 ; THIRY, o. c., n° 327 ; *Pasicrisie*, 1910, III, p. 268 s., where may be found the decision of the Tribunal of Verviers, of 12 Jan. 1910, deciding that recourse cannot be had to personal constraint.

2. The *Code Napoleon*, art. 214, quoted above, decrees that the wife is bound to follow her husband, « partout où il juge à propos de résider ». It would seem that this provision must be interpreted as meaning that the wife is bound to accompany her husband even abroad, of course, under certain conditions, and among others this (according to the second part of art. 214), that the husband, wherever he goes, must provide for his wife « tout ce qui est nécessaire pour les besoins de la vie, selon ses facultés et son état ». Cf. also ROGUIN, o. c., n° 138.

This community, when taken in the strict sense, constitutes neither a right nor an obligation ; it does so only when taken in the wider sense. For, this obligation is based on the marriage debt, which cannot be refused whenever one of the parties lawfully demands it in accordance with the principles laid down above ; but this conjugal duty can be perfectly fulfilled without a continuous community of bed, provided there is habitual community of bedchamber ⁽¹⁾.

Moreover, doctors disapprove of the practice of husband and wife sleeping together in the same bed, as being too stimulating, and injurious to health ⁽²⁾.

Note. 1. The right to cohabitation by day and night, of which we have just spoken, is not at the base of the conjugal bond, but is rather the coping of it. Cf. GASPARRI, O. C., nos 859, 1074, in opposition to certain authors.

2. Community of table and of family life, as well as the common care of the children, necessarily suppose a *certain community of temporal goods*. At the present day ⁽³⁾ it is the civil law ⁽⁴⁾ that regulates this matter ; and its provisions are binding so long as they are not opposed to justice and the natural law.

3. Before continuing our considerations, let us say a word as to the logical sequence of our statement, so that we may not appear to go round in a vicious circle. Above, no 130, in order to demonstrate the radical right of husband and wife to frequent relations, we appealed to the obligation they are under of living under the same roof and of sharing the same table, but without speaking of community of the same bedchamber or bed. The obligation that we then invoked we have now proved ; without it the very end and object of marriage would not be attained. As to community of bedchamber, we deduce the obligation of it from the right that husband and wife have to conjugal relations.

1. Even, according to GASPARRI, O. C., no 1077, « community of bedchamber, formally speaking, seems still to exist, where husband and wife occupy distinct, but contiguous rooms, with free access on either side. This practice is less praiseworthy, but exists in many families ».

2. SURBLED, *La morale*, I, p. 177 ss..

3. Formerly the canon law also made various provisions on this subject, as in l. IV Decr., tit. 20, *De Donationibus inter virum et uxorem*.

4. In the Code Napoleon, l. III, tit. V : *Du contrat de mariage et des droits respectifs des époux*.

PARAGRAPH II. CORPORAL SEPARATION.

I. SEPARATION AS TO COMMUNITY OF ROOF OR COHABITATION.

A. Teaching of the Church with regard to separation.

152.
A. Separation
as to commu-
nity of roof.

Teaching of
the Church,

The Church teaches 1. that separation or divorce as to *community of habitation* ⁽¹⁾ (or as to board or mutual service) is possible between married persons without breaking the marriage bond ; 2. that such separation is lawful *for various causes*.

These two points are confirmed by the Council of Trent, Sess. XXIV, can. 8 ⁽²⁾, in opposition to the Protestants, who, on the one hand, admit only the absolute dissolution of the conjugal bond, and look upon corporal separation, taken exclusively, as an immoral innovation ; while on the other hand, they accuse the Church of transgressing the rule laid down in Matth., V, 32, and XIX, 9, by permitting the separation of husband and wife for other causes than fornication.

as to the
morality of
such separ-
ation.

As regards the *first* point, we shall show later that the conjugal bond, produced by a marriage *ratum et consummatum*, is absolutely indissoluble, and that consequently in this case there cannot be any other than corporal separation. PERRONE, o. c., III, p. 398 ss., entirely refutes the charge of novelty, and to him we refer the reader.

Moreover, the practice of the Church, far from being contrary to morality, is the only really moral solution possible ; for, it alone keeps intact the principle of indissolubility, a principle essential for the safeguarding of morality and social welfare, as we shall see more clearly in the sequel (see n° 180 and the following). Certainly, it is not an easy thing for a separated party to observe

1. Divorce dissolving the nuptial contract itself is called divorce *quoad vinculum*. PETER LOMBARD, l. IV, Dist. XXXI, B, calls it sacramental separation, in opposition to divorce *quoad torum et cohabitationem*, which he calls corporal separation.

2. « Si quis dixerit Ecclesiam errare, quum ob multas causas separationem inter conjuges, quoad torum seu cohabitationem, ad certum incertumve tempus, fieri posse decernit, A. S. ». Cf. THEINER, o. c., I, p. 313 ss., where he quotes the discussions held in the Council about that matter and the tenor of the successively reformed canon (pp. 335, 387 and 425) ; in the first wording (p. 313) canon VIII included also that canon which is now indicated as the 6th. See also ESMEIN, o. c., II, p. 308 ss.

continency ; but, if hands are laid on the principle of indissolubility, the act results in evils yet more disastrous to society (¹). Besides, many other circumstances inevitably arise in which married people are bound to observe continency, either temporary or perpetual, e. g., in case of illness or insanity of one of the parties, etc.

With regard to the *second* point, besides the sin of fornication, *and its causes.* the Church does, indeed, admit other causes of separation, such as the desire of a more perfect life, heresy and provocation to sin ; but such toleration is nowise opposed to the teaching of the Gospel. St. Matthew, in the passages referred to above, speaks of the repudiation of a wife for a fault, and does not concern himself at all with the question of a motive of perfection justifying a corporal separation. That question is dealt with elsewhere, Math., XIX, 29, where we read « Every one that hath left... or wife... for my name's sake, shall receive an hundred fold, and shall possess life everlasting ». But in the previous passage, the Evangelist is concerned with the fault of the wife, and speaks only of fornication, because that alone is, of its nature, a cause for perpetual separation, and a cause peculiar to (²) and intrinsic (³) to marriage. There are even some authors, as we shall see in n° 199, who propose a more radical solution of the difficulty drawn from St. Matthew. They claim, and not without reason, that in the text of St. Matthew there is no question of corporal separation, but solely of dissolution of the bond.

1. « Le fait est incontestable, le veuvage perpétuel qu'entraîne la séparation de corps peut être pénible. Mais à cette considération on a répondu : La législation dans sa marche impitoyable rencontre bien des situations individuelles dignes d'intérêt et de sympathie ; elle passe, et en passant elle broie, elle écrase ; elle représente l'intérêt de tous, et il y a des misères auxquelles elle ne peut donner que sa compassion ». ALLEGRE, o. c., t. I, p. 176. See also below, nos 180 and 181.

2. The other causes of separation are common to all communities and societies ; thus the danger of perversion obliges one to break with any society whatever.

3. « For, by it (fornication) the advantage of marriage itself, which consists in fidelity, is directly prevented and utterly destroyed, hence an adulteress is deservedly put away, according to the saying : ' there is no need to keep faith with one who breaks faith '. The other causes of separation are extrinsic to marriage », Perrone, l, c.

Moreover, we may retort against Protestants their own practice. In the first place their canonical regulations permit a) simple corporal separation, in conformity with the rule laid down by Luther, but subsequently revoked, which forbids the re-marriage of the guilty during the lifetime of the innocent party ⁽¹⁾; b) they admit several causes of divorce in addition to adultery, particularly malicious desertion of the conjugal roof by one of the parties, by extending the *Casus Apostoli* to the marriages of Christians themselves ⁽²⁾; and yet other causes.

153.

Causes of
separation :

B. Causes justifying separation.

1. Adultery.

a/ adultery,

a/ *Adultery* is a cause of separation. This is the teaching of the Church : cap. 4 and 5, X, IV, 19. The natural law, in like manner, favours it, since adultery is directly opposed to conjugal fidelity. We are speaking here of adulterous relations that are of their nature fitted for generation ; and we must put in the same class with these, consummated sins of sodomy (with a third person) and bestiality. The three cases, in fact, equally violate conjugal fidelity, since in each of them there is complete coition with a third party. The same cannot be said of sodomitic relations between husband and wife, even when accompanied by violence.

b/ The act of adultery must be a/ *formal*, that is to say, perpetrated with knowledge of the fact. Simply material adultery does not suffice, as for example the act of a man in error, who believes the woman he is with to be his own wife ; neither does adultery effected by violence, e. g., in the case of a married woman who is forced, suffice. The adultery must be formal because separation is penalty, and consequently presupposes guilt. β/ There must be no *countervailing* act of adultery on the other side ; for then the wrong done by each party to the other is obliterated

1. Cf. ROEDENBECK, o. c., p. 115-127, and compare with what we say later, under n° 202a. The same author, page 71 s., observes that certain Protestant canons seem to advise the innocent party to be content with corporal separation, and not marry again. Moreover, the Anglican Church admits the corporal separation, as one can see in WATKINS, o. c., p. 427 ss.

2. ROEDENBECK, o. c., p. 72 s. ; compare again with n° 202a.

3. *Ibidem*, p. 112-115 ; VERING, o. c., par. 263, p. 943 s. ; see once more n° 202a.

by their respective misconduct. This condition, readily understood, is laid down in the canon law, cap. 4, X, IV, 19, and cap. 7, X, V, 16. The same observation applies to the case in which the uncompromised party has driven the other to adultery ; cf. cap. 6, X, IV, 13. If the fault is really only on one side, it is further necessary : 1/ that it should not have been *condoned*, because the party who condones, either in express words or tacitly, is held to have renounced his right to separation ; voluntary admission of the guilty party to conjugal relations on the part of the innocent party, duly cognizant of the fault committed, constitutes tacit condonation.

2. *Apostasy or heresy*, subsequent to marriage (1).

This cause of separation was inserted in the canon law (cap. 6, *b/* *apostasy or heresy*, X, IV, 19), partly on account of its analogy with the sin of adultery, since the embracing of heresy is looked upon as an act of spiritual fornication (2), and partly also because of its resemblance to the *Casus Apostoli*, in which the converted party is permitted to forsake the infidel party, and even, in certain cases to contract a fresh marriage. Cf. cap. 7, X, IV, 19.

3. *The case of grave danger to soul or body*.

There is danger to the *soul*, when one of the parties compels the other to sin, and effectual resistance is out of the question while remaining under the same roof (such a case would be that of a wife whose husband cannot in any way be induced to give up the onanistic use of the condom) (3) ; in like manner this danger exists, where impotence supervenes on marriage, and brings with it the proximate danger of incontinency which could not be avoided merely by the occupation of a separate room. This cause is a legitimate one, since Christ himself urges Christians to give up everything that is a scandal to them, even, if necessary, to the

1. There is no need to say that the partner's heterodoxy, whether infidelity or heresy, if anterior to the marriage and known to the other partner, does not constitute a cause of separation.

2. HERMAS, *Mandatum*, IV, cap. I, v. 9 (in FUNK, *Patres Apostolici*, I, p. 395), puts apostasy on the same footing as adultery, and permits separation as well for the former as for the latter. He says ; « the man who defiles the flesh is not the only adulterer, but whoever acts as the pagans do is an adulterer ».

3. Cf. *Collat. Brug.*, XVI, p. 702 s.

plucking out of an eye, or the cutting off of a hand. Cf. also c. 1, C. XXVIII, qu. 1.

There is danger, and grave danger, to the *body*, in the case of cruelty, serious threats to kill, or contagious disease. In this last case, however, if the occupation of a separate room affords sufficient protection, one cannot proceed to separation. On a like footing with bodily danger may be put the imminent risk of losing one's entire fortune through the extravagance of the other party ; but in this case it is generally sufficient to have recourse to a separation of property. See the Civil Code, art. 1443.

*d/ the choice
of a more per-
fect life.*

4. *The choice of a more perfect life* may also be a lawful cause of separation: a/ if made by *mutual consent* of husband and wife, and under the conditions that we shall presently explain, it affords ground for separation ; b/ if made *against the will* of one of the parties, it does not justify separation, except during the first two months of marriage, in favour of the party who thinks of entering Religion ; provided, however, that the marriage has not been freely consummated. In case of consummation, see what we have said in n° 133 (1).

154.
*Practical ob-
servations.*

Note. 1. Where a legitimate cause of separation exists, the innocent party (2) may, as a rule, under the reservations that we shall indicate in n° 155 s., leave or send away the other party ; but ordinarily he *is not bound to do so* (3), unless in the exceptional case where a continuance of

1. In case of consummation having been violently or deceitfully extorted, the offended party may, as we have said, embrace the religious life against the will of the other party, and make a valid profession, without however, the matrimonial bond being dissolved. If, the marriage having been freely consummated, one or the other party, against the will of the other, embraces the religious life and makes his profession, this is invalid ; moreover, he may be compelled by the party remaining in the world to resume cohabitation, and he is not obliged to re-enter Religion after the other party's decease. He is not allowed, however, being bound by a simple vow of (imperfect) chastity, to contract a fresh marriage, and in the use of his actual marriage, he must follow the rules given under n° 136.

2. The *guilty* party cannot take the initiative in departing, and even, if abandoned by the other party, ought to hold himself in readiness to resume cohabitation. He could not, for example, embrace the religious life, unless the innocent party had definitively renounced intercourse with him, either by entering Religion, or in some other way.

3. Formerly, in certain countries, *the husband could not* continue to cohabit with an adulterous wife, nor even take her back when repentant. This is clear

cohabitation would entail for himself or the children a proximate danger of perversion, or would produce a scandal.

Accidentally it may happen that the innocent party is bound by the law of *charity* not to make use of the right, either for the sake of sparing a repentant partner, or on account of the children, so that e. g., they may not be brought to want or shame. Moreover, even where there is no question of an obligation of charity, it is often better that there should be no separation (and this is what the parish priest and the confessor should strive for, prudently and with due consideration of all the circumstances), since a separation is almost always disastrous for the parties, for their children, and for their respective relations.

2. Adultery is *of its nature* a cause of *perpetual* separation, so that the innocent party can never be compelled to resume conjugal life with the guilty, even when repentant, unless, perhaps, at times *charity* may require it, as we have said above.

The other causes of separation are, *of their nature, temporary*; whence it follows that on their cessation, e. g. by the conversion of the apostate, or by the amendment of the one who was an occasion of sin, there is, as a general rule, an obligation to resume cohabitation (¹). *Occasionally*, however, there may be certain attendant circumstances that render them perpetual; such a case is that of a partner, who has definitively embraced the religious state, or in favour of whom the ecclesiastical judge has pronounced a decree of perpetual separation. This latter case may be realised when apostasy or heresy are in question, according to cap. 6, X, IV, 19, and cap. 21, X, III, 32, even if the guilty party repents.

3. According to the more probable opinion, as we shall show later, *marriages of unbaptized persons* fall under the jurisdiction of the civil authority, and such marriages are subject to the causes of separation recognised by the State.

C. Reservations and necessary precautions.

The first reservation to be made concerns *the intervention of the ecclesiastical judge*.

155.
Precautions
to be taken :
1^o obligation
of applying to
the ecclesiastical
judge,

from the texts quoted by ESMEIN, o. c., II, 91 s. See also St. BASIL, letter, 188 (the first of his canonical letters), can. 9 (*Migne*, XXXII, col. 674), who speaks of this custom, and also of another, little in conformity with Holy Scripture, as he avows, by which the wife was obliged to remain with her husband, even if he misconducted himself with an unmarried woman.

I. See in the *Canon. Contemp.*, 1908, p. 157, a case of separation for cruelty on the part of the husband, where the wife was compelled by the Episcopal Court to resume cohabitation.

a/ under the
common law,

1. *By the common law :*

The party can, of *his own authority and without waiting for a judicial sentence*, leave or send away the partner, not only when there is danger in delay, in which case a provisional separation is always lawful, but also when the *adultery is certain and notorious*. The reason of this is, on the one hand, that the Church clearly permits it (see cap. 4, on this title) ⁽¹⁾; and on the other hand, that in this case a judicial declaration serves no purpose, since the certainty of the fact is supposed; and as it is notorious, all the requirements of the *forum externum* are satisfied.

Apart from this solitary case, it is not lawful for the one party to break the community of life by his own private authority, seeing that separation is a matter for the *forum externum*. Consequently where the adultery is doubtful or occult ⁽²⁾, or where some other canonical cause is invoked, recourse must be had to the Ordinary, to whom it belongs to declare or decide that there are grounds for proceeding to separation ⁽³⁾.

Note. This is what the common law says; but in practice it is better never to proceed to definitive separation before obtaining the judgment of the Church, even when the adultery appears to be certain and notorious, the more so, as in this matter error and exaggeration may easily occur.

156.
b/ under the
particular
law of the
diocese of
Bruges.

2. *By the particular law of the diocese of Bruges :*

« It is not lawful for any married person to leave the conjugal abode, with the intention of separating, on his own authority and *without consulting the parish priest* » ⁽⁴⁾.

1. The law texts quoted by ESMEIN, o. c., II, p. 89, to prove the necessity of the intervention of the ecclesiastical judge, relate to the dissolution of the marriage bond.

2. One is surprised to find some authors affirming that in the case of adultery, certain but occult, the innocent party may, *in the forum of his own conscience*, proceed to separation on his own authority. But separation is always a matter for the *forum externum*.

3. GASPARRI, o. c., n° 116, teaches, however, that *temporary* separation is lawful for the innocent party, on his own authority, in case of heresy or apostasy of the other party. GENNARI-BOUDINHON, o. c., Part I, I, p. 384, adds to that the case in which the innocent party could not prove in the *forum externum* the existence of a cause that is sufficient in fact.

4. Decree of the Prosynodal Congr. of Bruges, 1893. It at the same time re-

Thus, apart from the case in which there is danger in delay, when provisional separation may be put in force without consulting anyone, married persons cannot leave or send away one another, *even in the case of public adultery, without first consulting the parish priest.*

It is the business of the *parish priest* to draw up the case, but not to decide it judicially ; that belongs to the *Ordinary*. The Bishop is the judge of the external forum ; and it is to him, *except in the case of certain and notorious adultery* ⁽¹⁾, that causes of separation must be referred ; nevertheless, the deans, in virtue of an episcopal provision ⁽²⁾, may permit « to the faithful of their district provisional corporal separation, but must report it to the Ordinary, if within the space of two months reconciliation has not taken place ». Noting this, the following is the course to be followed in practice :

a/ Parish priests cannot, *apart from the case of adultery certain and notorious*, permit corporal separation, without the preliminary permission of the Bishop, or provisional permission of the dean. It is best to have recourse to the latter, either in a case of emergency, or when the separation is likely to be of short duration.

*Practical
rule.*

b/ If married people have already separated on their own authority, and refuse to resume cohabitation, the *parish priest* must (saving the exception already mentioned) lay the facts before the Bishop, or, if there is hope of an early reconciliation, before the dean, and await the decision. The *confessor*, on his side, cannot absolve such separated married people, without having first admonished them ⁽³⁾ of the obligation they are under of presenting themselves to the parish priest, and of laying the state of affairs before him, out of confession. If he finds them ready to do so, he can then absolve them.

c/ If the Bishop grants *perpetual* separation, it is sufficient that such permission be obtained once for all ; if he pronounces only *temporary* separation, e. g., for six months, then the permission must be renewed in due time. For this, it will be an advantage for the parish priest to have a list of the married persons in his parish, who, with the consent of the Bishop, are living temporarily separated. This list should be sent to the Bishop's house at a suitable time, for confirmation and prolongation, if there is occasion for

quired the priests of parishes where these separations are somewhat frequent, to admonish the faithful to this effect, especially at the approach of Paschal time, and to read to them the formula given in the *Liber Manualis*, p. 201. See *Acta Congr. Prosyn.*, tom. V.

1. *Acta Congr. Prosyn.*, 1908, in the *Coll. Brug.*, t. XIII, p. 431.

2. *Statuta dioec.*, p. 69.

3. We put aside the case of good faith, when the confessor foresees that the penitent being admonished will refuse to obey, and if at the same time there is no scandal.

it ; each time any change in the circumstances of each case should be carefully noted therein, or the fact that there is no change (1).

157.
Case of the
party forsaken,

Note. 1. The case of *the party forsaken* is not included in the decrees of the diocese of Bruges, and consequently it must be solved in accordance with the general principles :

a/ If it is *through the fault* of the party forsaken that, the other party has gone away, the former must promise, under pain of being refused absolution, to make every possible effort to bring about a resumption of conjugal life, and, in case of failure, to lay the matter before the parish priest.

b/ If the forsaken party *is not in fault*, and it does not depend on him to resume cohabitation : then, if the matter is public, he is not bound to do anything ; if it is not public, he is bound (and the confessor should, as a rule, admonish him of the fact) to lay the circumstances before his parish priest : « for, though he be innocent in conscience, and the conjugal life has not been dissolved through his fault, it is nevertheless necessary that his innocence should be known to the *external forum of the Church*, and that so the sentence of the ecclesiastical judge may prevent him from becoming a cause of scandal. If the party in question promises in the tribunal of penance to fulfil this obligation, he may be absolved.

or absent.

2. Absence does not, as a *general rule*, imply separation. It may be mutually agreed upon *without the least intervention of authority* ; the husband may even permit himself a short absence from home against the will of his wife, provided that he has some reasonable cause for doing so, such as discharging his duties, or attending to his business.

Sometimes, however, absence from home constitutes a real separation, as for example, when one of the parties goes away to establish himself at a distance, without any intention of returning, and the other party refuses to follow him. In such a case, it is necessary to apply the rules already given, as to the need of a canonical cause, and recourse to the parish priest and Ordinary. The party who goes away must be considered as the

1. Chaplains to institutions for the aged, should also make it their business to know if any of the old men under their charge has a wife still living, and similarly cared for in some other institution. Such are to be considered as corporally separated, and their case referred to the Ordinary.

author of the separation, and the other as deserted, by his own fault or otherwise, according as he was free in conscience to refuse to make the change, or bound to follow the other. See n° 150.

The **second reservation** to be made affects only the case of ^{158.} *2° special reservation for the case of separation with a view to a more perfect life.*

The Church requires, as often as the parties are both *of one accord in their desire for separation*, a/ either that they should both embrace the religious life in a religious Order strictly so called; or b/ that at least one of them should embrace it and make solemn profession, provided the other has already passed the age when the passions are strong, and being of a moral character beyond suspicion (¹), choses either to receive Orders, or take a vow of chastity in a religious congregation that is not in the strict sense a religious Order, or occasionally in the world (²).

Nevertheless, the Church sometimes modifies this provision of the law, and permits, e. g., a man still in the prime of life, to receive Orders, after the solemn profession of his wife; or allows a young wife, whose husband has entered Religion, to take a vow of chastity in the world; or, again, a wife more advanced in years, whose husband has been admitted to Orders, to make a vow of chastity without entering a religious Order (³).

II. SEPARATION A TORO, OR OF BEDCHAMBER.

Of its nature, this *partial* separation is *lawful*, outside the cases ^{159.} *B. Separation a toro.* in which corporal separation is permitted, as often as the parties

1. It belongs to the Bishop to judge of it; as a rule in this matter a woman is reputed to have passed that age at 50, and a man at 60.

2. That this vow may be duly authenticated, it must be taken in the presence of the Ordinary, or his delegate, and of two witnesses.

3. Cf. BENED. XIV, *De Synod. dioc.*, L. XIII, c. XII, n. 16; FEYER, o. c., nos 500-513 and n° 524; ROSSET, o. c., t. VI, nos 3932-3944. The *Anal. eccl.*, 1904, p. 90, give an example of permission granted under this latter form; cf. also LEITNER², *Lehrb.*, p. 199. There are some authors who hold that a dispensation is not required in this case, as they say that a vow emitted under these precise conditions, constitutes a diriment impediment of marriage, and is consequently equivalent to a solemn profession (see SANTI, o. c., l. III, tit. 32, n. 9; OJETTI, *Synopsis*, II, n. 1858, V° *Divortium*). But it does not appear that this opinion is admissible, as will be pointed out in n° 284.

mutually consent to it, and also against the will of one of them, whenever there is a sufficient reason for refusing the marriage debt, according to the rules laid down above. This separation does not concern the external forum, and consequently depends on the personal initiative of the parties.

When one of the parties has a *right* to make the separation a *toro*, there is *no obligation* to do so, except where the use of marriage has become unlawful for one or the other, e. g., in the case of impotence supervening on marriage. Apart from this exception, it is often better not to use the right, so as to avoid many inconveniences ; even it may sometimes happen that the law of *charity* prevents the exercise of the right of separation, e. g., where there is danger of incontinency for either party.

Scholion. Civil legislation.

160.
Civil
legislation.

We have seen above, n° 150, that the Code Napoleon expressly recognises the right and obligation to cohabitation, leaving to the husband the choice of the conjugal domicile.

In what concerns the complete separation of husband and wife ⁽¹⁾, which it calls *séparation de corps*, art. 306 makes the following provision : « Dans les cas où il y a lieu à la demande en divorce pour cause déterminée, il sera libre aux époux de former demande en séparation de corps ».

Thus the Civil Code does not permit corporal separation by mutual consent of the parties, a consent which nevertheless suffices, according to art. 233, to obtain, under certain conditions, a sentence of divorce. It requires for corporal separation a *cause déterminée*, one of those that will be set forth more at length below, viz., adultery ⁽²⁾ excesses, and cruelty together with grave injury, according to articles 229, 230 and 231.

In order that separation may be legitimate before the civil law, there must be a judicial decision, as is clear from the wording of art. 306 quoted above.

1. The civil law decrees nothing as to separation of bedchamber alone.

2. *Adultery on the part of the wife* is sufficient to enable the husband to claim separation ; on the other hand, in order that *adultery on the part of the husband* may have a like effect in relation to the wife, *it is necessary* that the husband should have *brought his mistress into the conjugal dwelling*. We shall see, however, that even without that, adultery on the part of the husband may be a cause of divorce, and so of separation, on account of the grave injury that it involves.

ARTICLE 4. Mutual love and assistance.

As we have seen, the marriage bond brings with it for husband and wife, in virtue of the *essential end* of marriage, the right and obligation to the marriage debt, to the education of the children, and to community of dwelling and of bedchamber.

161.
Many considerations
bind husband
and wife to
mutual love,

But these bonds and these intimate and exclusive relations, this ceaseless community of life by day and night, these common and convergent efforts for the good education of the children, are inconceivable, and, as experience proves, unstable, where complete union of heart, unfailing love, and mutual assistance given in the thousand daily needs of domestic life are wanting.

The *voice of nature* itself impels husband and wife to love and mutually assist one another.

The *sexual relations*, blending husband and wife together in one flesh, still further stimulate and *nourish* this love ; and children, the fruit and pledge of affection, cement and strengthen it.

Saint Paul, in his Epistle to the Ephesians, V, 28, 29 (and his words are true for wives also) thus speaks of conjugal love, basing it on the bodily union : « So also ought men to love their wives as their own bodies. He that loveth his wife, loveth himself. For no man ever hated his own flesh, but nourisheth and cherisheth it ».

Finally *St. Francis de Sales*, o. c., P. III, ch. 38, is eloquent in speaking of Christian love, of love *made holy and supernatural* : « It is nothing to say to you, husbands and wives : love one another with a natural love, for mated doves do that ; or to say ; love one another with a human love, for love like that the heathens had ; but, following in the footsteps of the great Apostle, I say to you : 'Husbands, love your wives, as Christ also loved the Church' ; wives love your husbands as the Church loves her Saviour. It was God who brought Eve to the first parent of our race and gave her to him for wife ; it was God also, my friends, who with unseen hand tied the knot that binds you in holy Matrimony, and gave you to one another. Why, then, should you not love one another with a most holy, whole-hearted and divine love ? » (1).

to a love, holy
and superna-
tural.

1. The words of J. L. Vivis, *De officio mariti*, Bruges, 1529, are to the point : « Terrestris amor caecus est, abjectus, obscoenus, circa vilia et spurca ; nam praestantiora illa nunquam intuetur. Coelestis vero amor oculatus, virtutis rerumque vere pulcherrimarum, et coelestibus similium cognatarumque affectator. Mariti qui uxorum vel formam vel pecuniam amant, terrestri amori sunt subditi et excoecati, nec in amando rationem neque modum ullum norunt ; qui vere mariti sunt et animas et virtutes diligunt, ii non carent iudicio in amore, et coelestis illi amoris vi et spiritu quodam inflati prudentissime amant, amorque

This love is quite compatible with the *husband's precedence*. He is, indeed, the *head of the family*, and he has authority over his wife ; it is incumbent on him to protect her, and to make proper provision for her support ; but such headship is perfectly consistent with mutual love, and is, in truth, tempered thereby⁽¹⁾.

The civil law. **Note.** On this head the Code Napoleon declares, art. 212 : « Les époux se doivent mutuellement fidélité ⁽²⁾, secours ⁽³⁾, assistance ⁽⁴⁾ » ; and, art. 213 : « Le mari doit protection à sa femme, la femme obéissance à son mari » ⁽⁵⁾.

ille purus et sanctus non impellit illos aut praecipitat, quod facit terrenus violentia, sed sapienter persuasos molliter quo oportet adducit. Amat sapiens maritus uxorem et quidem validissime, sed ut parens filium, ut caput corpus, ut animus carnem, ut Christus Ecclesiam ».

1. Cf. the Encyclical *Arcanum* of Leo XIII : « The husband is the chief of the family, and the head of the wife. The woman, because she is flesh of his flesh, and bone of his bone, must be subject to her husband and obey him ; not, indeed, as a servant, but as a companion. In such obedience there is not wanting either honour or dignity. Since the husband represents Christ, while the wife represents the Church, let there always be, both in him who leads and in her who obeys, heavenly love as the guide of their duties » (*Authorised Translation*, London, 1880). Cf. *Coll. Brug.*, t. IX, p. 189 ; *Catech. Conc. Trid.*, P. II, c. VIII, n° 26 s.

On these mutual relations of husband and wife, and the allied question of *feminism* in relation to the *natural* and *Christian* law : cf. St. THOMAS, *Suppl.*, q. 64, art. 5 ; C. WILLEMS, *Philosophia Moralis*, Treviris, 1909, p. 368 ; CASTELEIN, o. c., p. 540 ss. and p. 562 ss. ; SERTILLANGES, *Féminisme et Christianisme*, Paris, 1908, p. 243-277 ; LEITNER² *Lehrb.*, p. 538 ss., and p. 36 ss., who shows the state of inferiority in which the wife was kept of old, and the little consideration shown her.

2. To this duty is opposed *adultery*, which in the Belgian Penal Code, art. 387 ss., is liable to heavy penalties, especially on the part of the wife, but only in the case in which the injured party demands it.

3. The duty of *secours* consists in the obligation.... of providing for his partner all that is needful for living. PLANIOL, o. c., I, n. 904.

4. « The *assistance* is not to be confounded with the *secours* ; it consists in the personal care to be bestowed upon the partner in sickness or infirmity ». The same, n° 917.

5. In virtue of the principle inserted in article 213, the husband is the head of the family ; the wife is placed in dependence on him and under his protection ; she is, so to speak, in a state of quasi-minority with respect to her husband, and placed under his care. *This state of dependence* appears in the obligation she is under of following her husband in his change of domicile (see above, n° 150), in her legal participation in his nationality (art. 5 and 11 of the law of 8 June 1909), and above all, in legal incapacity. She cannot, as a general rule, exercise

CHAPTER II.

EFFECTS OF THE CONJUGAL BOND.

The obligations and rights of which we have hitherto spoken are the constituent elements of the conjugal bond. This bond brings with it certain legal effects, with which we shall now occupy ourselves, while considering anew marriage as a contract, apart from its sacramental character.

162.
Effects of the
bond :

The *first effect* of the conjugal bond is the **constitution of a distinct family**. The husband and wife, in marrying, see themselves uprooted, as it were, from their own families in order to bring into being a new family, independent and self-subsisting, in which new and intimate relations find their place between husband and wife, and between parents and children, under the headship of the husband (¹). This is expressed in Genesis, II, 24, by the words:

1^o Constitution of a
distinct family ;

any legal act, without her husband's authority (art. 215 ss.). Observe, however that the right of corporal correction formerly in force, no longer exists. See on this subject PLANIOL, o. c., I, n^o 922, LOTTHÉ, o. c., p. 27 ss.

PLANIOL, o. c., I, n^o 930 explains at length this legal incapacity of the wife ; cf. also VAN BIERVLIET, *Ons Burgerlijk Wetboek*, Antwerpen, 1904, who shows that this idea was borrowed from the ancient German law ; on p. 2, he foreshadows a change to be introduced into the Code in this respect, by the commission charged with the revision of the Civil Code, and observes that the Belgian law of 10 March 1900 has already mitigated the original rigour of the legal provisions (SERVAIS ET MECHELINCK, *Les Codes Belges*, p. 1014 ss). See also DEVOS, *De gehuwde Vrouw* ; SERTILLANGES, l. c. ; CASTELEIN, o. c., p. 562 ss. For a comparison between the law of the Code Napoleon and that of the new German Code, in which the wife's legal capacity is almost entirely secured, consult the learned pages of CRÉTINON, o. c., p. 169-171 ; read also SALEILLES, *La condition juridique de la femme dans le nouveau Code civil allemand*, in the *Réf. Soc.*, t. 42, p. 717 ss. and the *Rev. eccl. de Metz*, 1901, p. 203 ss.

1. This constitution of a distinct family by marriage is sanctioned in the Code, Napoleon by the fact that the wife is entirely withdrawn from the authority of her father and of her own family ; that she is emancipated by the very fact of her marriage ; that she changes her own name for that of her husband ; and finally that she is bound to the domicile of her husband, as we have already said.

In the *Roman law* it was quite different. The son of the family, not yet emancipated, remained after marriage under the power of the *paterfamilias* or head of the family, as well as the children born to him. As to the wife, if she married *in manu*, she passed, indeed, into the family of her husband, but not under his power, but under that of his *paterfamilias* ; she had no authority over her own children, with respect to whom she was as a sister, while with respect to her hus-

« a man shall leave father and mother, and shall cleave to his wife ».

2° *special relationship* ;

The *second effect*, which we shall develop later on, consists in a **special relationship** created by the conjugal bond between each of the parties and the relations of his or her partner. For, a/ the marriage, even before consummation, causes each of them to contract the diriment impediment of *public decency*, in respect of other members of the partner's family to the fourth degree ; and b/ the marriage, when consummated, gives rise to the diriment impediment of *affinity* with the same persons, an affinity of a *different kind* from that which arises from sexual relations between unmarried persons ⁽¹⁾.

Moreover, the children are related to the families of their father and mother, and contract with all the members thereof, to the fourth degree, a connection and consequent impediment of consanguinity, differing again from the corresponding connection and impediment contracted out of marriage ⁽²⁾.

band she was as a daughter (LEFEBVRE, o. c., p. 61, 64 and 67). If she married *sine manu*, she remained under the power of her own *paterfamilias*, and she continued to belong to a family other than that of her husband and of her own children, for whom she was as a stranger, so that they were not related to her, and had no right to succeed as her heirs (*ibid.*, p. 72 ss. and 82 ss.).

In the *ancient Germanic law*, marriage established a distinct family, and intimate relations between husband and wife, and between parents and children. Nevertheless, the authority of the husband over his wife and children was shared and tempered by that of a sort of *family council*, composed of all the male relations of full age. That council has its counterpart at the present day in the *Vormundschaftsgericht*, recently introduced in Germany by the Code of 1900. Cf. CRÉTINON, l. c., n° 175.

1. Of itself, such illicit affinity is not amenable to the external forum, and does not invalidate marriage beyond the second degree. In our (the Belgian) civil law, as we shall show later on, when speaking of affinity, it has its source in marriage, whether consummated or not, but it does not involve the impediment of public decency (By the English law also, affinity is created only by marriage. Tr.).

2. LEFEBVRE, o. c., p. 41 s., shows how in the Code Napoleon the regulation of relationship is also based upon marriage. See above, n° 149, and also what we have just said in the note on the ancient Roman law : in marriage *sine manu*, the wife was not looked upon as related even to her own children ; and in marriage *cum manu*, the children were not related to their maternal, but only to their paternal ancestors.

The *third effect* is the LEGITIMACY OF THE CHILDREN.

163.
3° legitimacy
of the child-
ren.

We must now set forth the *canonical discipline* : show how, in its eyes, marriage is the *source of legitimacy*, and in particular explain how 1° marriage renders legitimate, children conceived or born therein ; 2° how and to what extent it is capable of *legitimizing* children illegitimate by birth.

FIRST PROPOSITION. **Legitimate** (otherwise called legitimate and natural) *children, before the ecclesiastical law, are such as are born of a mother, who, at the time of their conception, was lawfully married, or of one who, though invalidly married, was married in good faith before the Church, or of one, who, at least before their birth, had contracted a valid or putative marriage.*

Legitimate
children are
those born of
a valid,

We must except children who are clearly proved to be by some other man than the husband of the mother ; as well as those conceived by conjugal act of the parents, after the father or mother, subsequently to a former consummation of the marriage, have taken a solemn vow of chastity, or have received sacred Orders.

1° *Putative marriage*, i. e., marriage contracted in good faith, suffices for the legitimacy of the children, as appears from cap. 2, X, IV. 17 (1), as well as from chapters 8, 11 and 14 of the same title (2). But it is necessary that the marriage should have been contracted publicly, and not clandestinely, or in opposition to the Church, as may be gathered from the decree quoted, and as is distinctly declared by cap. 3, X, IV, 3 (3), and the Council of Trent, Sess. c. 1, *De Reformatione Matrimonii*. See above n° 35.

or putative
marriage,

1. « When canonical judgment of divorce (*quoad vinculum*) between the man and woman has been pronounced (i. e., when the nullity of the marriage has been declared), the children shall not suffer thereby, when the parents are known to have married publicly and not in opposition to the Church. Therefore we ordain that the children that such persons have had before the divorce, or who have been conceived before the pronouncing of judgment, shall, notwithstanding, be considered as legitimate ».

2. Cf. ESMEIN, o. c., II, p. 33-37, who shows how this provision of the law was introduced. Peter Lombard, l. IV Sent., was the first to raise a doubt on this subject. He was followed by Magister Rolandus, who, on becoming Pope, settled the question.

3. « If anyone presume to contract one of these *clandestine or forbidden* marriages in the forbidden degree, even without knowledge of such relationship, the

The good faith of *one* of the parties suffices, whether it arises from ignorance of fact or of law, provided that the ignorance is not affected. This is deduced from the tenor of the last decree mentioned above, according to the interpretation of experts in canon law ⁽¹⁾.

contracted
before their
conception or
before their
birth;

2. We say : children born of a mother who, at the time of their conception or at least before their birth, has contracted a valid or putative marriage. Of itself, legitimate birth supposes legitimate *conception*, and it is clear that a child *conceived* in marriage will be regarded as legitimate ⁽²⁾ ; but nevertheless legitimacy is possible outside of this hypothesis. For, as SCHMALZGRUEBER says, l. c., n° 10, though legitimacy is, in itself, an effect of the natural law, yet it is also dependent on the positive law, which has the power of extending the effects of legitimacy to those of illegitimate birth, as is done in the case of legitimation by subsequent marriage.

If, therefore, a child, *conceived* before marriage, is not *born* until after marriage, it is, according to the accepted practice of the

children born of such union shall be considered as absolutely *illegitimate*, and the ignorance of their parents shall not avail them, since the father and mother, by contracting in such a way, appear to have been affecting ignorance rather than really wanting in knowledge. In like manner children must be regarded as illegitimate, when *both* of their parents married *knowing* of their being under a real impediment, even though no opposition was made, and the marriage took place before the Church ».

It is, therefore, necessary that the requisite proclamations should be made, and that the form prescribed by the Council of Trent should be duly observed, at least in the case of marriages that are subject to the law of clandestinity, Cf. SCHMALZGRUEBER, on the tit. XVII, n°s 42-43 ; DE BECKER, *De Matr.*, p. 371-372 together with the note.

1. For the text of the decree does not in any way restrict the case of good faith to ignorance of fact. It excludes only affected ignorance, and declares illegitimate only those children, *both* of whose parents knew that they were bound by an impediment, i. e., when both acted in bad faith. Observe however, that even good faith at the time of the marriage does not fully suffice : « it is necessary that there should still be good faith, at least on one side, at the time of conception ». REIFFENSTUEL, on tit. XVII, n. 5 ; *Monitore eccl.*, 1912, p. 42 s.

2. *As a rule*, conception is supposed to have taken place during the marriage, if the child is born after the 180th day following the marriage ceremony, and before the 300th following its dissolution, e. g., by the decease of the husband. Cf. SCHMALZGRUEBER, l. c., n°s 40-41 ; REIFFENSTUEL, l. c., n°s 19-23 ; GASPARRI, o. c., II, n° 1069 ; DE BECKER, *De Matr.*, p. 371 ; WERNZ, o. c., IV, n° 635.

ecclesiastical courts, considered as legitimate. In such a case the child is *presumed* to be that of the husband, and the sexual relations that led to its conception are, by a legal fiction, considered as legitimate by reason of the marriage that preceded the birth ⁽¹⁾.

3. From the benefit of legitimacy must be *excepted* :

a) Such as are *clearly proved not to be the husband's children*.

164.
with two
exceptions.

And in fact, if the canon law holds as legitimate the children conceived by, or at least born of a married mother, it is only because it *presumes* them, as we have already said, to be the result of lawful matrimonial relations, or at least of relations had between parties who subsequently married before the birth of their offspring ; in which case a legal fiction retrospectively legitimates coition as far back as the time of conception. This presumption is based on the legal principle : *is pater est quem nuptiae demonstrant* (the father is he whom marriage point out as such). But this presumption is not inevitable, and must yield to the ascertained fact, since it is not *juris et de jure* ⁽²⁾.

1. Looking at the matter in itself, and with due regard to the provisions of the law, there remains a speculative doubt as to the legitimacy of such offspring. For, as BENED. XIV says, in his Constit. *Redditae Nobis*, n° 3, in the *Parvum Bullarium*, III, « texts are against texts, doctors against doctors, and tribunals against tribunals ». But *when there is doubt, the children must have the benefit of it*, and the case be settled in their favour. This is the course followed without hesitation by REIFFENST., on tit. XVII, n° 17 et ss. ; SCHMALZGR., *ibid.*, nos 9 and 10 ; and BÖCKHN, *ibid.*, n° 10. At the same time they give the legal texts on which they rely, and references to the authors that they make use of. GASPARRI, o. c., II, 1071, and DE BECKER, *De Matr.*, p. 370-371, lean to the same opinion.

2. Nevertheless, since the benefit of the doubt must be given to the child and the marriage, no doubtful argument, however probable, suffices to destroy the presumption in their favour. There must be an absolutely convincing argument, at least where the parties were already married at the time of conception ; consequently it is not enough that the mother has been guilty of adultery, or that she has acknowledged, even on oath, that the child was conceived in adultery ; nor is it sufficient that the child bears a greater resemblance to the adulterer than to the husband. There must be conclusive proof, e. g., proof drawn from husband's absence, or from his impotence consequent on sickness, between the 300th and the 180th day before the birth. Cf. SCHMALZGRUEBER, l. c. nos 39-40 ; REIFFENST., nos 10-12 ; GASPARRI, o. c., nos 1069 ; see also the solution of the case given in the *Acta S. Sedis*, XVII, p. 378 seq.

b/ We must in like manner except children *conceived by conjugal act of the parents, after one of the parents*, subsequently to a former consummation of the marriage, *has taken a solemn vow of chastity, or has received Holy Orders.*

Children born of such illicit intercourse are canonically illegitimate, and are consequently by the very fact irregular. This is deduced from chapters 1, 14, X, I, 17 (1).

165.
Different
classes of
illegitimate
children.

Note. 1. As a logical consequence of what we have said above, **illegitimate** children are such as are born of a mother who, neither at the time of their conception, nor at the time of their birth, nor in the interval, had contracted a valid or putative marriage; as well as such as being born, indeed, of a married woman, are nevertheless proved not to have been begotten by her husband, and also the children just mentioned on b/. Illegitimate children are :

a/ *Natural*, according to SCHAMALZGRUEBER, l. c., n° 6, « if they are born out of wedlock, of parents who *might have* married one another at the time of conception, or at the time of birth, or in the interval ».

b/ *Spurii*, « if they are born of parents, between whom marriage did not exist, and *could not have* existed during any part of the time that elapsed between conception and birth », on account of some *diriment* impediment (*ibid.*).

Among *spurii*, some are *adulterine*, « those born of adultery... ; others are *sacrilegious*, those whose father or mother is either a religious, or a cleric in major Orders (2) ; others, again, are *inces-*

In practice, therefore, when the child or a married woman is presented for baptism, it must be entered in the baptismal register as a legitimate child, even if the father or mother declare it adulterine. The only exception, as we have just said, is that of the husband's absence or impotence, duly ascertained. In the case of the husband's absence, the parish priest will mention the fact in the register, and will certify that he has baptized the child N..., born of N..., lawful wife of N..., absent between the 300th and the 180th day before the birth.

1. Cf. SCHMALZGRUEBER, o. c., on this passage, nos 33-38. The case of a dispensation must be excepted.

2. As we have just said, those children ought also to be considered sacrilegious who are born of lawfully married parents, but of whom one or the other, after a former consummation of the marriage and before the conception of the child in question, has taken the solemn vows or received Orders.

tuons, namely those whose parents are united with one another by affinity or by collateral consanguinity ; others, in fine, are known as *nefarii*, that is to say, those that are born as the result of intercourse between father and daughter, or between any direct ascendants and descendants whatever ». REIFFENSTUEL, l. c., n° 28.

2. Legitimacy, *in the ecclesiastical forum*, implies competency for the lawful reception of the tonsure and Orders, as well as for ecclesiastical benefices and prelacies. Those who are illegitimate are not competent in this respect, in other words they are irregular. What legitimacy implies.

SECOND PROPOSITION. *Natural illegitimate children are legitimated by a subsequent marriage contracted between their parents.*

166.
Natural
children are
legitimated,

The **proof** of this proposition is found in cap. 6, X, IV, 17 : « *The efficacy of marriage is such, that its celebration causes the children previously born to be considered as legitimate* ». In other words : « subsequent marriage, by a fiction of the law, is referred back to the time of the child's birth or conception ; so that, the antecedent defect being suppressed, the child is considered as the issue of a marriage then existing... This provision was made in favour both of the children and of the marriage : in favour of the *children*, who thus escape suffering for the fault of another, and obtain the rights of legitimate birth ; in favour of *marriage*, because parents previously living in illicit intercourse are thus induced to marry for the love of their children » (1).

Explanation.

We say 1. *natural* children ; for other illegitimate children do not share in this privilege. This is clearly established, as concerns

1. SCHMALZGR., on this title, n° 49. The first example of legitimation by subsequent marriage *before the Church* is found in cap. I of the same title, attributed to Alexander III, who is also the author of cap. 6. Cf. ESMEIN, o. c., II, p. 39 s. ; POTHIER, o. c., nos 408 s.

This method of legitimation was borrowed by the Church from the Roman law, which recognised in a subsequent legitimate or proper marriage (*justæ nuptiæ*) the power of legitimating children born, not of any kind of union, but only of that known to them as *concubinatus* ; see above n° 83. Cf. Pothier, o. c., nos 7 s. ; VIOLLET, *Histoire du droit*, p. 471-473 ; and especially GENESTAL, o. c., p. 150 s., where may be found the evolution of the law set forth at length.

adulterine children, by cap. 6, quoted above (¹), and by the Constitution of Bened. XIV. *Redditæ Nobis*, par. 2 ; and the commonly accepted doctrine deals with other *spurii* in the same way. Cf. REIFFENSTUEL, on this title, n° 37, together with the reason that he gives (²).

On the other hand, all children, without exception, who according to the definition that we have given, come under the head of *natural* children, share in the privilege ; not only those whose conception took place when there was no diriment impediment between the parents, but the others also, provided the impediment had disappeared *before their birth* (³). The best canonists (⁴) maintain this doctrine in the interests of the child ; and the S. Penit. has openly spoken in the like sense in its recent reply of 21 Apr. 1908, quoted in the *Coll. Brug.*, t. XIV, p. 97 ss.

There is, however, a keen controversy among authors on the subject of children who are *apparently natural* but really *spurii*, such as are born of

1. « If a man, during the lifetime of his wife, misconducts himself with another woman, and has a child by her, that child will be *spurius*, even when the guilty party, after the death of his wife, has married the mother ». At the end of the original text, in the First Compilation, the following clause appeared : « Seeing that a lawful marriage cannot be contracted between such persons ». See the *Friedberg* edition.

2. As we shall point out in n° 168, this reason is : that legitimation is, by a legal fiction, regarded as going back to the birth ; or rather that the subsequent marriage is looked upon as dating from the moment of the birth ; it is accordingly necessary that it should have been capable of existence at that time, and consequently that there should not have been any diriment impediment between the parents at that time.

3. According to REIFFENSTUEL, l. c., n°s 40-41, « if a man, during the life of his wife, has intercourse with another woman, and his wife dies before the other woman gives birth to her child, such child (as being merely natural) is legitimated by subsequent marriage between its parents ». The same happens when a dispensation, *before the birth* of the child, removes any other impediment that the parents were under *at the moment of conception* ; the child is born natural, and may be legitimated by a subsequent marriage.

4. SCHMALZGRUEBER, l. c., n°s 63-68, with the authors quoted ; REIFFENSTUEL, l. c., n° 39 ; SANCHEZ, *De Matr.*, l. VIII, cap. VII, p. 19 ; BARBOSA, on this title, n°s 27 ss. ; BÖCKHN, on this title, cap. *Tanta*, n°s 30-31 ; FERRARIS, *Prompta Biblioth.*, under *Filius*, n°s 23, 32, 39-42. The following are also of the same opinion : FEYE, *De Imped.*, n° 741 ; SANTI, on this title, n° 5 ; GASPARRI, o. c., n° 1123 ; DE BECKER, *De Matr.*, p. 378 ; PUTZER, o. c., n° 120.

parents who are under an impediment, that is, in good faith, *unknown to one or the other of them*. The opinion that denies such children the benefit of the privilege seems the better founded, at least where it is a question of children natural in appearance, but in reality *adulterine*. This interpretation fits in better with the text of chapter 6, and many commentators have adopted it. A list of them is given by SCHMALZGRUEBER, l. c., n° 59, though he himself holds the contrary opinion (1).

We say 2. *by the very fact of a subsequent marriage*. By this is to be understood any lawful marriage whatever, even one that is merely *ratum et non consummatum*, contracted at any time, even at the moment of death, and without the antenuptial proclamations or express permission for their omission. It is immaterial whether the marriage follows the birth of the child immediately or mediately (2), as REIFFENSTUEL clearly shows, l. c., nos 30-34.

It is, however, a *disputed point* whether the same efficacy is to be conceded to a *putative* marriage, i. e., to one contracted invalidly, *in good faith*, before the Church, and after the customary proclamations (3).

We say 3. *contracted between the parents of the illegitimate child*. On the one hand, a marriage contracted *between the parents* legitimates at once and fully the children already born : there is no necessity for the consent of any interested party, and the Canon Law does not require, as does the Code Napoleon, the express recognition of the child by its parents, either before or during the celebration of the marriage.

On the other hand, the marriage of the mother *with a man other than the father of the child* cannot in any way legitimate it. Hence, whenever this occurs, and the case has been legally

1. Cf. FEYE, *De Imp.*, n° 741 ; *Acta S. Sedis*, XXVI, p. 419-424 ; DE BECKER, *De Matr.*, p. 378 ; PUTZER, o. c., nos 119 ss. ; WERNZ, o. c., IV, 680 ; ESMEIN, o. c., II, p. 44.

2. The child is equally legitimated by the marriage of its parents, when the father first marries some other woman, and then, after the death of that wife, marries the mother of the child.

3. The negative opinion is maintained by REIFFENSTUEL, l. c., nos 35-36 ; BÖCKHN, l. c., n° 21 ; BARBOSA, l. c., nos 41-43, and others. The affirmative opinion is supported by SCHMALZGRUEBER, l. c., nos 56-58 ; PIRHING, on this title, n° 39 ; FERRARIS, l. c., n° 37, and the authors quoted by him ; SANTI, l. c., n° 9 ; FEYE, *De Imp.*, n° 741 ; PUTZER, o. c., n° 120 ; DE BECKER, *De Matr.*, p. 376.

established in the external forum, the parish priest cannot admit or register as legitimate the child in question ; nor can he take into account either the declarations of the mother and her future husband, or the legal acknowledgment or legitimation that has taken place in the civil court. Nevertheless, so long as there is no certain proof to the contrary, presumption of paternity attaches to the man who marries the mother ; consequently, notwithstanding any suspicions he may have as to the truth of the statement, the parish priest will admit the declaration freely made to him by the contracting parties, and will enter in the register the legitimation of the child (¹). Cf. *Coll. Brug.*, t. XI, p. 726 s., where certain observations may be found as to the method of proving that the contracting parties are in fact the natural parents of the child.

167.
*Spurii may
be legitimated
by Papal
rescript.*

Note. 1. *Spurii*, i. e., illegitimate children other than natural, are not legitimated by the marriage of their parents, but, with certain conditions and formalities, they can be legitimated *per Rescriptum Principis*, as it is called (²), that is to say, by a rescript of the Sovereign Pontiff, since the benefit of legitimation depends, in part at least, on the good will of the Pope. As this rescript of legitimation finds its proper place under the head of matrimonial dispensations, we refer the reader there.

168.
*Efficacy of
legitimation.*

2. What is the *efficacy* of *legitimation* in the ecclesiastical forum ?

If acquired *through the subsequent marriage* of the parents, it confers the power of receiving Orders, benefices and ecclesiasti-

1. The *Pastor. Brug.*, p. 278 and 279, with regard to this entry says : « If a child born before marriage is theirs, the parish priest will be careful to insert the fact of its legitimation in the record of the marriage, and will add thereto the following words : *insuper sponsus N... declaravit filium sponsae suae N..., natum die... mensis... anni...*, *suam esse prolem, quam per matrimonium legitimare intendit* ». In the baptismal register the parish priest will also make a marginal entry of this legitimation together with a reference to the marriage register. To ensure the due observance of this formality, the Congr. Prosynod. of the diocese of Bruges, 1871, art. 6. prescribed : « that if the child was baptized in a parish other than that in which the marriage takes place, written notice of the legitimation must be sent to the parish priest of the place of baptism ».

2. For the origin of legitimation *per rescriptum Principis* in the Roman and in the ecclesiastical law, see WERNZ, o. c., IV, n° 680, IV ; VIOLETTE, *Histoire du droit*, p. 473 ss ; GENESTAL, o. c., p. 182 s.

cal dignities, with the sole exception of that of the cardinalate ⁽¹⁾; moreover, by a fiction of the law, it is regarded *as going back to the time of birth*. Consequently, as REIFFENSTUEL says, on title XVII, n° 60, compared with n°s 42 and 43, children thus legitimated « are made equal in everything with really legitimate children (saving the exception made above); and are included in all those provisions of the positive law which require legitimate birth ⁽²⁾ ». If, on the contrary, legitimation has been granted *by Papal rescript*, its efficacy may be equally comprehensive with that acquired through subsequent marriage ⁽³⁾, or it may be more limited in its effects ⁽⁴⁾.

3. In addition to legitimation, there are also other means of removing, at least in part, the disabilities arising from illegitimate birth. Thus *solemn profession*, by a provision of the law, renders those who are illegitimate capable of receiving Orders, though not the prelacy ⁽⁵⁾; *dispensation* on its side can produce the like effect in particular cases.

4. There were formerly various *rites of legitimation* in existence: a/ sometimes the children to be legitimated were placed under the cloth extended over their parents at the time of receiving the nuptial blessing, to signify that they were henceforth to be considered as the issue of that marriage. If we admit that the cloth in question represented the nuptial bed, the meaning is made yet more clear ⁽⁶⁾.

169.
*Ancient rites
of legitima-
tion.*

1. This exception was introduced by Sixtus V, in the Constitution *Postquam*, of 3 Dec. 1586, § 12.

2. Cf. SCHMALZGR., on title XVII, n°s 82, 94 ss.; FERRARIS, *Prompta Biblioth.*, under *Filius*, n° 43 s.

3. For example in a *sanatio in radice* the legitimation of the children is ordinarily retrospective, and goes back to the moment of birth.

4. We have been speaking of the efficacy of legitimation in the *ecclesiastical forum*. In the Belgian civil law, in virtue of art. 333, « les enfants légitimés par le mariage subséquent auront les mêmes droits que s'ils étaient nés de ce mariage ». It would seem that the Pope could not, except in extraordinary cases and by making use of his indirect power, cause to be attributed to canonical legitimation an efficacy bringing with it civil effects, i. e., cause to be recognised as legitimate in civil law, illegitimate children legitimated in virtue of a rescript or special canonical provision. See cap. 13, X, IV, 17, and compare with WERNZ, o. c., IV, n° 687; DE BECKER, *De Matr.*, p. 406 s.

5. Cf. GENESTAL, o. c., p. 80 s.

6. Cf. KOGLER, o. c., p. 55-64; see also above, n° 122.

b/ Or again, at the time of the celebration of the marriage, *the father or mother covered the child with his or her cloak*. This second ceremony was borrowed from the ancient Roman rite of adoption (1).

c/ Finally there were, here and there, yet other ceremonies in use : for example, during the celebration of the marriage the children were bound to the parents by a girdle or cord, or placed on the knees or in the lap of the mother (2).

Scholion I. Civil legislation.

170.
Civil
legislation.

By the Code Napoleon 1. the following are considered as *legitimate* :

a/ All children *conceived* during the marriage ; that is to say, born after the 180th day after the celebration of the marriage, and before the 300th day after its dissolution (3), whether the marriage be valid or putative (4).

Nevertheless, the husband has the right of disowning a child, so as to render it illegitimate, when it is *physically* certain that it is not his, that is to say, if he can prove : « que pendant le temps qui a couru depuis le trois-centième jusqu'au cent quatre-vingtième jour avant la naissance de cet enfant, il était, soit pour cause d'éloignement, soit par l'effet de quelque

1. KOGLER, o. c., p. 64-70, is at pains to show that this symbolical ceremony signifies that the child is born of those parents. He also finds the same signification in the rite of adoption, which according to him denotes between adopter and adopted the relations of natural paternity. The ceremony of the cloak caused children thus legitimated by subsequent marriage to be known as *filiï mantellati* (*mantelkinders, enfants de manteau*).

2. The same, p. 77 s.

3. 300 days correspond to a space of 10 months, and 180 to that of 6 months, according to the method of reckoning at the time of the drawing up of our (the Belgian) civil Code. The German code fixes as the extreme limits the 302nd and the 181st day.

Observe that in order to establish the legitimacy of the child, according to the rule given, it is necessary first to establish its *filiation*. But the filiation of a *legitimate* child is proved, according to articles 319 and 320, « par les actes de naissance inscrits sur les registres de l'état civil » and, « à défaut de ce titre, la possession constante de l'état d'enfant légitime suffit » ; see also the following articles, and PLANIOL, o. c., I, nos 1384-1410.

4. Articles 201 and 202. A *putative* marriage, in the eyes of the Code Napoleon, is one that both parties, or one of them at least, contracted in good faith, and that has been subsequently annulled on account of some essential defect.

In the case of a putative marriage, the children are held to be legitimate, and are regarded by the civil code as legal heirs, even in respect of the party who was not in good faith. See the decision of the Court of Cassation of Paris, of 5 Jan. 1910 (in *Pasicrisie*, 1910, IV, p. 161). Cf. THIRY, o. c., no 203 ; decision of the Court of Brussels, *Pasicrisie*, 1912, II, p. 57 ss.

accident dans l'impossibilité physique de cohabiter avec sa femme » (1).

b/ Children *born* in wedlock, though conceived before the marriage. For, they are then presumed to be the issue of the marriage, according to the legal saying likewise admitted in the ecclesiastical law: *is pater est quem nuptiae demonstrant*; see above, n° 163. Nevertheless, the husband may disown such children, merely by a simple declaration of non-paternity, if they were born before the 180th day following the matrimonial contract, except in the three hypotheses mentioned in art. 314, viz., « s'il a eu connaissance de la grossesse avant le mariage; s'il a assisté à l'acte de naissance, et si cet acte est signé de lui ou contient sa déclaration qu'il ne sait pas signer; si l'enfant n'est pas déclaré viable ». See PLANIOL, O. C., I, n°s 1417 s., n. 1559, n°s 1429 and 1439.

2. All children not included in one or other of the two classes mentioned above are considered as *illegitimate*. Consequent on the condition of their respective parents, some are called *simply natural*, viz., those whose parents, at the time of the legal conception, were not prevented by any diriment impediment from marrying one another; while others are known as *incestuous* or *adulterine*, according as their parents, at the time of legal conception, were related with one another within the prohibited degrees and undispensed, or one or the other of them was at that time married to some person other than the father or mother of the child. See above n° 149.

3. *Illegitimate but natural children* (to the exclusion of adulterine or

1. Art. 312. Cf. also art. 313, which provides that the husband may, in a case of adultery and when the birth of the child has been concealed from him, disown it, even though he can only invoke a *moral* impossibility in support of his non-paternity. Cf. PLANIOL, O. C., I, n°s 1435 s.; decision of the Cour de Gand, 3 Jan. 1908, *Pasicrisie*, 1909, II, p. 371 ss.

The Belgian Senate, in its session of 16 March 1911, voted the draft of a law, due to the initiative of M. Alex. Braun, which will probably be adopted by the Chamber and sanctioned by the King. The following clause would then be added to art. 313: « En cas de jugement ou même de demande en divorce ou en séparation de corps, le mari pourra désavouer l'enfant né trois cent jours après la décision qui aura autorisé la femme à avoir un domicile séparé et moins de cent quatre-vingt jours depuis le rejet définitif de la demande ou depuis la réconciliation. L'action en désaveu ne sera pas admise si la femme prouve qu'il y a eu réunion de fait entre les deux époux ». *Annales Parlementaires*, Senat, Séance du 16 mars 1911, p. 244; cf. *Collat. Brug.*, XI, p. 329 s. See also COULON, *Le Divorce et la Séparation* p. 279, where may be found the text of the French law of 6 Dec. 1850, modifying in the same sense art. 312 of the civil code; the only difference being, that the text adopted by the Belgian Senate expressly lays on the wife the burden of proof of the circumstances alleged by her against the legal presumptions.

incestuous children) ⁽¹⁾, can be legitimated ⁽²⁾ « par le mariage subséquent de leur père et mère, lorsque ceux-ci les auront légalement reconnus avant leur mariage, ou qu'ils les reconnaîtront dans l'acte même de célébration ». Art. 331 of the civil code ⁽³⁾.

Observe that such children are not legitimated by the mere fact of the subsequent marriage, but only when legally acknowledged by their parents either before their marriage, or in the act of its celebration ⁽⁴⁾.

Moreover, and this must be carefully noted, our (i. e. the Belgian) civil law, like the canon law, requires that the subsequent marriage should be between the natural parents of the child to be legitimated. Thus the civil officer commits a grave offence if, as sometimes happens, he urges the

1. In virtue of the law of 8 Apr. 1908, art. 342b of the civil code, the exception made against incestuous children does not apply to children « nés de personnes parentes ou alliées, entre lesquelles le mariage pouvait être autorisé par dispense ». See also CARON, O. C., p. 235-242, and p. 262; likewise PLANIOL, O. C., I, n° 1553, who quotes with disapproval the change introduced by the law of 7 Nov. 1907 into the French law, in favour of adulterine children. Henceforth such children can, under certain circumstances, be legitimated by subsequent marriage. See also NAQUET, *Vers l'union libre*, p. 270 ss. who speaks of a movement in favour of the suppression of the restrictions imposed by the law.

2. Legitimated children enjoy, before the law, the same advantages as legitimate children, but only from the time of the celebration of the marriage. Art. 333. See also n° 168, above.

Natural children legally acknowledged, but not legitimated, cannot « réclamer les droits d'enfants légitimes », art. 338. Acknowledgment proves the status of natural child in relation to a determinate person; it does not change that status.

Observe also that legitimation may be granted, in virtue of art. 332, « en faveur des enfants décédés, qui ont laissé des descendants, et dans ce cas, elle profite à ces descendants ».

3. Legitimation by subsequent marriage is, at present, the only legitimation possible in civil law. The *Rescriptum Principis* has disappeared from our legislation, though formerly in use, as we have remarked, referring our readers to VIOLET, *Histoire du droit*, p. 473 ss.; cf. PLANIOL, O. C., I, n° 1550 s.

4. This acknowledgment, according to the provisions of art. 331, must be made before the marriage, or at least in the act of its celebration. « La reconnaissance faite postérieurement à la célébration du mariage n'entraîne pas la légitimation. — Le législateur a craint que la reconnaissance postérieure ne soit pas l'expression de la vérité ». Tribunal de Louvain, 22 June 1910, in *Pasicrisie*, 1910, III, p. 243 s.; Cour de Chambéry 18 Dec. 1911, in *Pasicrisie*, 1912, IV, p. 62. On the other hand, acknowledgment, made in conformity with the law, holds good against him who made it until it is proved to be false, by evidence showing that the false avowal of paternity was due to error, deceit or violence. Decision of the Court of Appeal of Brussels, 22 Nov. 1910, in the *Pasicrisie*, 1911, II, p. 341.

prospective husband to acknowledge as his own a child that his intended wife has previously had by another man ⁽¹⁾. The priest should be careful not to imitate such conduct, and should follow the canonical rules laid down for the entering of legitimations in the register of marriages and of baptisms ⁽²⁾.

The common opinion of lawyers is, that children born before marriage may also be legitimated by a *putative* marriage, though this seems contrary to the tenor of articles 201 and 202 : this latter article speaks of children « *issus du mariage* ». See PLANIOL, O. C., I, n° 1109 ; THIERY, O. C., n° 304 ; CARTERON, O. C., who treats at length of putative marriage and its effects.

Scholion II. The Roman Law.

In the ancient Roman law, marriage was not the sole source of legitimacy, as in the canon and modern civil law ; the paterfamilias had the power of disowning his children, and of substituting others not connected with him by birth in their place, by means of adoption ⁽³⁾.

171.
Roman law.

CHAPTER III.

PROPERTIES OF THE CONJUGAL BOND.

ARTICLE 1. Unity of the conjugal bond.

Preliminary observations. 1. To the unity of marriage is opposed *polygamy*. Polygamy, in the etymological sense of the word, comprises the state of a man who has several wives (*polygyny*),

172.
To the unity
of marriage
are opposed
the various
kinds of
polygamy.

1. It also happens that the prospective husband, with a view to rehabilitating his future wife, acknowledges as his own a child that she has previously had by another man. But when the future husband and wife freely declare, and without constraint recognise as the offspring of their intercourse a child to whom the future wife has previously given birth, it is no part of the civil officer's duty to refuse to register their declaration, even though he has good reason to believe it to be untrue. But such acknowledgment can, by the terms of art. 339 of the civil code, be contested by all who have an interest therein. See on this subject the *Revue d'Administration et de Droit administratif*, 1908 (t. 55), p. 341 ss., where is reported a consultation on this question, sent to the authorities at Brussels by the civil officer of that city.

2. See *Coll. Brug.*, t. VI, p. 122 ; XI, p. 726 s. ; XII, p. 766 s. ; cf. also, *Archiv. f. k. K.*, 1910, p. 161 s., which states that in Austria a law has recently been passed to restrain this abuse still existing there.

3. « Le paterfamilias pouvait exclure de sa *domus* ses enfants ou ses petits-enfants *ex nuptiis*, les dépouiller même de toute *agnatio* ; d'autre part, il pouvait introduire dans sa *domus* et au même titre, avec pleine *agnatio*, des enfants de provenance étrangère, par l'adoption ». LEFEBVRE, O. C., p. 59.

and also the contrary state, namely, that of a woman who has several husbands (*polyandry*).

Polygamy is *successive* or *simultaneous*. Successive polygamy is rather called bigamy ⁽¹⁾ or digamy, trigamy, tetragamy and so forth.

Outline of
the principles
of natural
law.

2. The question with which we are at present occupied, and also the one that follows, are dependent on certain principles of *natural law*, which we will briefly recapitulate.

The precepts of the natural law are divided into *primary* and *secondary* precepts. In opposition to the *primary* precepts of the natural law are : firstly, acts directly opposed to the last end, such as destroy the relations that ought to exist between man and God ; secondly, those acts which tend to undermine the very foundations of society, and so, of their nature, overturn the relations that are essential between men, and necessary for the common welfare. Opposed to the *secondary* precepts are those acts which do not tend to destroy the established order, but are of a nature to injure or thwart it in the generality of cases. According as they are really injurious to it, or merely less favourable, such acts are *forbidden*, or simply *discountenanced* by the natural (secondary) law ⁽²⁾.

We say *forbidden*, viz, it is true that what is contrary to the secondary precepts is not injurious to the social order, except *in the generality of cases*, and may *per accidens* and exceptionally fit in with the general good ⁽³⁾ ; nevertheless, this does not prevent it from being forbidden by the natural law ; for the law considers things *in their generality*, in that which is *per se*. Cf. St. THOMAS, *C. Gent.*, l. III, c. 122.

1. In French (and also in English, Tr.), the word bigamy denotes the condition of a man having two or more wives at the same time.

2. Cf. St. Thomas, *Supplementum*, qu. LXV, art. 1 ; PALMIERI, o. c., p. III, 117 and 119.

3. St. THOMAS, *Supplem.*, qu. LXV, art. 2, speaking of what is contrary to the secondary natural law, i. e., « contra legem naturae, non quantum ad prima praecepta ejus, sed quantum ad secunda, quae quasi conclusiones a primis principiis derivantur », expresses himself as follows : « Sed quia actus humanos variari oportet secundum diversas conditiones personarum, et temporum, et aliarum circumstantiarum, ideo conclusiones praedictae a primis legis naturae praeceptis non procedunt, ut semper efficaciam habentes, sed *in majori parte* ; et ideo ubi eorum efficacia deficit, licite ea praetermitti possunt ».

Now, a/ To permit an action opposed to the *primary* precepts of the natural law, is not in the power of anyone, not even of God, at least by way of a general measure ⁽¹⁾. For the Creator himself cannot undermine the order established by Him.

b/ To permit an action contrary to the *secondary* precepts of the natural law, is in the power of God, even by way of a general measure, but not in the power of man. God alone can do that. It belongs to Him, and to Him alone, to dispense from the law that He has made, and to determine the cases in which *per accidens* the law admits of derogation ⁽²⁾. He can give this dispensation either *directly*, without an intermediate agent, or *mediately*, through the agency of the *Church*, at least where it is a question of obligations incurred through the act of man ⁽³⁾. He can then communicate His

1. We say, at least not *by a general measure*. For St. THOMAS teaches, *Suppl.*, q. LXVII, a. 2, that « it is in the power of God to dispense even from the primary precepts of the natural law... but such dispensations are not given to all in general, but rather to individuals, in a way analogous to that which is exemplified in the matter of miracles ».

BILLOT, *De Ecclesiae Sacramentis*, 1896, II, p. 386, explaining this doctrine, distinguishes both kinds of primary precepts of the natural law : « There is in the first place all what is in direct and immediate contradiction to the last end, all that which is directly and immediately opposed to God. For these God himself can give no dispensation, not even in virtue of His absolute power... In the second place, there are those acts which are forbidden because they are naturally destructive of the general good, of the social order, and on that account are in *mediate* opposition to the last end, since that cannot be attained otherwise than by means of human society. For those acts it is evident also that they admit of no general dispensation, granted to a whole community, so as to be regarded as an ordinary privilege... ; nevertheless there is no reason why *in a particular and altogether exceptional case* those acts should not be withdrawn by a divine disposition from their natural condition, according to which they are contrary to the last end, so as to tend to God in a higher and, so to speak, miraculous manner, outside of the order of second causes ».

2. St. THOMAS, *Suppl.*, l. c. continues his argument in these words : « Sed quia non est facile determinare hujusmodi varietates (personarum, temporum...), ideo illi, ex cuius auctoritate lex efficaciam habet, *reservatur* ut licentiam praebeat legem praetermittendi in illis casibus, ad quos legis efficacia non extendere se debet, et talis licentia dispensatio dicitur » ; and he further adds that the natural law « non est humanitus sed divinitus instituta », and « ideo in hoc *a solo Deo* dispensatio fieri potest ».

3. Cf. BILLOT, o. c., II, p. 402 s., who very appropriately distinguishes the twofold power exercised by the Church, and at the same time gives the reason of

power in part to the Church, which exercises it, not in its own name, for it is but a *ministerial* or *instrumental* power in its hands, but in name and by the authority of God, who is the real holder of the power (¹).

FIRST PROPOSITION. *Successive polygamy has never been condemned either by the divine law, or by the common law of the Church ; though regarded as a less praiseworthy state.*

Explanation and demonstration.

173.
Successive
polygamy has
never been
prohibited.

A. No argument can be advanced to prove the establishment of the prohibition by **divine law** ; and though some Oriental writers have affirmed the contrary (²), their assertion has no foundation in fact.

B. Let us now consider the **ecclesiastical law** :

1. It is beyond doubt that from the objective and absolute point of view, the Church has never favoured remarriages, and has always regarded successive polygamy as an *imperfect state*, gene-

expediency that arms the Church with a certain authority to remove several obligations of the divine and natural law, viz., such as arise from human acts : « There are obligations imposed by God, as the Author of nature or of grace, *independently of all deliberation on the part of the human will* ; and there are others that are established only in consequence of the act of man and of the determination of his free will, as is apparent in the case of a vow, an oath and so forth. Now, between these two kinds of obligation there is an evident difference as regards the point with which we are concerned. For man, in his decisions, is incapable of examining beforehand and foreseeing all the circumstances in which it may become inexpedient or less advantageous to accomplish what he has promised by vow, or even sworn, or sanctioned by contract. This is why, for the good of Christian society, in cases of this kind, a dispensation can sometimes be given by the Vicars of Christ, as particular occasions arise. But the above reason does not apply to those obligations which have their foundation in the divine will alone, since the Providence of God foresees everything and leaves nothing to chance ; there can then be no question of remedying the want of human foresight ». Cf. St. THOMAS, 2^a 2^{ae}, qu. LXXXVIII, a. 10, ad 2^m.

1. SUAREZ proposes a different explanation in his treatise *De Legibus et Deo Legislatore*, t. II, p. 15, and many authors agree with him. Cf. ESSER, o. c., p. 35-49, who compares these divergent solutions.

2. Thus Nicholas, Patriarch of Constantinople, in the controversy of Leo VI, maintains that fourth marriages are contrary to the divine law. Cf. JUNGSMANN, *Dissert. in hist. eccl.*, Ratisbonae, 1884, IV, p. 135 s.

rally indicating a want of continency ⁽¹⁾, and less perfectly representing the one union of Christ with the Church, His one spouse. Add to this that second marriages are often injurious to the children by the first marriage, as well as to the peace of families.

The mark of imperfection attaching to remarriages, and particularly the suspicion of incontinence to which they give rise, are the principal reasons why the Fathers have judged so severely second, and still more third and fourth marriages ⁽²⁾. Thence came also the penance that it was formerly the custom to impose on those who married again ⁽³⁾, and the prohibition forbidding priests to be present at the festivities of a second marriage ⁽⁴⁾; for the same reason such unions were not solemnly blessed ⁽⁵⁾, and those who had contracted them were debarred from Orders ⁽⁶⁾.

Nevertheless, 2. *the common ecclesiastical law* has never made any *prohibition strictly so called* in this regard. And, in fact, St. PAUL, in his first epistle to the Corinthians, VII, 39, says: « A

*at least by
the common
law.*

1. Clement of Alexandria, *Strom.*, l. III, c. 12. (*Migne*. VIII, col. 1183): « If the Apostle permits second marriages to those who are consumed by the heat of passion... such persons certainly do not follow the maxim of lofty perfection of life proposed in the Gospel ».

2. It is in this sense that St. GREGORY OF NAZIANZUM, *Oratio* XXXVII, n. 8, whose words must, however, be taken with a grain of salt, says: « The first (marriage) is the law, the second a condescension to weakness, the third an iniquity, and anyone who goes beyond that is plainly hoggish ». *Migne*, XXXVI, col. 291. In like manner St. BASIL, *Letter* 188 (1st of the canonical letters), declares that third marriages deserve not the name of marriage, but that of polygamy, or rather « regularised fornication (*moderatam fornicationem*) ». *Migne*, XXXII, col. 674. The Fathers were, moreover, careful to add, against remarriages, the argument drawn from the welfare of the children and the peace of families. Cf. CHARDON, o. c., p. 185 s.

3. Ch. 8, C. XXXI, q. 1: « A temporary public penance was imposed on such as remarried frequently ».

4. *Ibid.*: « The priest must not be present at the festivities of second marriages, especially as it is then the rule to impose a penance ».

5. See above, n° 122, and MARTÉNE, o. c., l. I, P. 2, ch. IX, art. I, n° 7. Cf. CASTAN, o. c., who remarks that in France, under the ancient regime, the people themselves were opposed to second marriages, and sometimes demonstrated against them with rough music. See also the *Conférences de Paris*, III, p. 94.

6. DE BRABANDERE-VAN COILLIE, o. c., II, n. 1503.

woman is bound by the law as long as her husband liveth : but if her husband die, she is at liberty ; let her marry to whom she will » ; and he repeats this in his epistle to the Romans, VII, 2, 3. At the *Council of Florence*, in the decree for the Armenians, *Eugenius IV* expresses himself thus : « We declare that not only second, but third and fourth and subsequent marriages can be lawfully contracted, if there be no impediment thereto ». In like manner, *Hermas* ⁽¹⁾, *St. Ambrose* ⁽²⁾, *St. Jerome* ⁽³⁾, *St. Augustine* ⁽⁴⁾, and other Fathers ⁽⁵⁾, neither commend nor condemn second marriages.

But beyond this, it has often even happened that the Church has recommended second marriages, not objectively and absolutely speaking, but as a remedy for incontinence. Thus we read in the *Instr.* of the S. C. de P. F., of 8 Sept. 1869 : « Their Eminences... have enjoined the missionaries to tell the faithful that such (second) marriages are not disapproved of by the ecclesiastical law, provided there is no impediment ; widows should therefore be advised to marry again, if there is danger of incontinence » ⁽⁶⁾.

Such is the *common law* ; but if we turn to the *local law*, especially in the East, we find that there has sometimes been excessive severity, as is exemplified by the well known controversy about the fourth marriage of the Emperor Leo. See PALMIERI, O. C., p. 102 ss.; VERING, O. C., p. 914 ⁽⁷⁾.

SECOND PROPOSITION. *Simultaneous polygamy is forbidden by the natural law in the following way : polyandria is opposed to the primary precepts of the law, and polygyny to its secondary precepts only.*

1. « Dic, si vir vel mulier alicujus decesserit, ut nupserit aliquis eorum, numquid peccat ? Qui nubit non peccat ». *Mandatum*, IV, n° 4. (Ed. Funk).

2. « Non prohibemus secundas nuptias, sed non probamus sacpe repetitas ». *De Viduis*, c. 11 ; *Migne*, XVI, col. 254.

3. « Non damno digamos et trigamos, et si dici potest, octogamos ». *Ep. 48 ad Pammachium*, n° 9 ; *Migne*, XXII, col. 499.

4. « De tertiis et quartis et de ultra pluribus nuptiis solent homines movere quaestionem. Unde et breviter respondeam : nec ulla nuptias audeo damnare ». *De Bono Vid.*, c. 12 ; *Migne*, XL, col. 439.

5. Cf. PESCH, O. C., VII, n° 858 ; PALMIERI, O. C., p. 98 s.

6. *Collectanea*, n° 1378, and compare with n° 1377.

7. In Russia, under the influence of the orthodox Church, the existing civil law still forbids fourth marriages. Cf. CASTAN, O. C., p. 16 s.

Explanation and demonstration.

I. Simultaneous **polyandria** ⁽¹⁾ is in opposition to the primary precepts of the natural law. The reason of this is that it is destructive of the essential economy of marriage, and consequently tends to undermine the foundations of society, which is based upon marriage and the family. Simultaneous polyandria destroys marriage, inasmuch as it renders its primary end unattainable; for, though such a union may lead to the birth of children (less readily however, than monogamy) yet, of its nature, it puts an *obstacle in the way of their proper education*. And in fact, as we have shown above, the normal education of children requires the care and joint efforts of both father and mother; but where the father is unknown, his assistance must practically be wanting ⁽²⁾. The union of a woman with two or three husbands at the same time is therefore absolutely unlawful, and such a marriage is altogether invalid.

174.
Polyandria
is forbidden
by the
primary
natural law.

II. Simultaneous **polygyny** is opposed to the *secondary*, but not to the primary precepts of the natural law.

Such a union does not in fact *destroy* the essential economy of marriage, and therefore is not *subversive* of the established order. The procreation and education of children, the *proper* end of marriage, are not rendered impossible thereby, and consequently simultaneous *polygyny* is not opposed to the primary precepts of the natural law. On the other hand, however, such a union is of a

175.
Polygyny is
forbidden by
the secondary
precepts of
the natural
law.

1. WESTERMARCK, O. C., p. 114 s. and p. 426 s., enumerates the different forms of polyandria; likewise PEITEL, O. C., p. 26; see also *La Revue sociale catholique*, VIII (1904), p. 49 ss., where we read that in Thibet polyandria exists in a special form, called *punaluan*: several brothers having one and the same wife, though it is properly the eldest who possesses her by right, and after his death, the second. Cf. AVIGDOR, O. C., p. 31; HOWARD, O. C., I, p. 68 s. and p. 81.

2. St. THOMAS, in *Suppl.*, qu. LXV, art. 1, ad 8: « Unam uxorem habere plures viros, est contra prima praecepta legis naturae, eo quod per hoc quantum ad aliquid totaliter tollitur, et quantum ad aliquid impeditur bonum prolis, quod est principalis matrimonii finis. In bono enim prolis intelligitur non solum procreatio, sed etiam educatio; ipsa enim procreatio prolis, etsi non totaliter tollatur, quia contingit post impraegnationem primam iterum mulier impraegnari..., tamen multum impeditur...; sed *educatio totaliter tollitur*, quia ex hoc quod una mulier plures maritos habet, sequeretur incertitudo prolis respectu patris, cujus cura necessaria est in educando ».

kind to injure marriage (and therefore society), because, in the generality of cases, it is prejudicial to the education of the children ; the peace of the family is often disturbed, mutual support is wanting, and the cohabitation of the parties which is necessary for the work of education, frequently becomes exceedingly painful. Hence we conclude that polygyny, by the natural law, and abstracting from all positive law, is not merely discountenanced as less fitting, but *strictly prohibited*, and that every marriage contracted under these conditions is radically null ⁽¹⁾.

This is also clearly taught by the C. S. O. in its *Instruct.* of 20 June 1866 ⁽²⁾ : « It is a universally recognised principle that a marriage celebrated between infidels, at a time when the man had a former wife still living, is *null and invalid* both in the divine and *natural law* ». The authority of BENED. XIV, *De syn. dioec.*, l. XIII, c. 21, n. 9, corroborates this doctrine ; he says : « Durandus and Abulensis teach that polygamy is not repugnant to the natural law. Though it cannot be said that this singular opinion has been condemned by the Council of Trent... it nevertheless deserves to be censured as improbable and contrary to the common teaching of theologians, who declare polygamy... contrary alike to the divine and to the *natural law* ». See also WERNZ, o. c., IV, n° 361, together with notes 34 and 35.

Note. Generally the two sexes are approximately the same in number. This fact helps to show that polygyny is in opposition to the natural law ⁽³⁾.

1. Cf. MARTIN, o. c., I, p. 149-155. He there proposes several considerations drawn from the nature of marriage and from the reciprocal rights of husband and wife, which strongly support our thesis. Thus, on p. 153 s., he says : « Justitia jurisve aequalitas necessario requirit nullum teneri in commutationibus plus dare quam accipit, aut minus accipere quam tradit. Ergo et necessario Deus voluit virum et mulierem conjugium contrahentes non teneri minus accipere quam tradunt, nec proinde teneri utrumlibet, pro toto, quod tradit, corporis sui dominio ac jure, accipere partitum et incompletum jus atque dominium in corpus alterius. Ergo non potest vir... pro integro, quod accipit mulieris corpus corpori suo aequale, jure ac dominio, partitum corporis sui aut in alias uxores dividendum tradere jus et dominium ». Cf. also ZIESCHÉ, *Die Sakramentenlehre des Wilhelm von Auvergne*, Wien, 1911, 41 s., where he skilfully proposes the reason against polygyny.

2. *Collectanea*, n° 1354.

3. Cf. ZIESCHÉ, l. c. ; see on the other side WESTERMARCK, o. c., p. 434 ss. ; HOWARD, o. c., I, p. 136 ss.

THIRD PROPOSITION. *Simultaneous polygyny (properly called polygamy) was forbidden from the beginning, according to the most probable opinion, by the positive divine law, but this prohibition of the divine as also of the secondary natural law, was subsequently removed under the Old Law by a divine dispensation, which Christ afterwards entirely withdrew.*

176.
The law
monogamy
was establish-
ed by God in
the beginn-
ing,

Explanation and proof.

I. In the *original institution of marriage* God prescribed monogamy and prohibited polygamy. This follows, at least with great probability, from the fact of the creation of a single man and a single woman, and especially from the words of Adam *inspired by God* : « Wherefore a man shall leave father and mother, and shall cleave to his wife, and they shall be two in one flesh ». *Gen. II, 24.*

Interpreting these words, *Innocent III*, cap. 8, X, IV, 19, draws from them the following argument : « It (Holy Scripture) does not say : (God created) three or more, but only two ; neither does it say : he shall cleave to his wives, but to his wife. No one could ever have several wives at the same time, unless authorised by a divine revelation ; then only could this custom be called lawful, and it is by reason of this... that the Patriarchs and other holy men, of whom it is written that they had several wives at the same time, did not thereby commit adultery ».

The *Council of Trent*, Sess. XXIV, *De sacram. matrimonii*, also assumes that the words of Adam teach the unity of marriage, since it says : « Our Lord taught *more plainly* that the bond of marriage unites only two persons, when, referring to these words (they shall be two in one flesh) as uttered by God himself, He added : therefore now they are not two, but one flesh ». As *Palmieri* observes ⁽¹⁾, « if Our Lord, in explaining the words of Adam which are the words of God, taught *more plainly* the unity of marriage, we must conclude from that, that God had already taught it plainly, i. e., ordained it from the beginning ». The *Catechism of the Council of Trent*, P. II, c. VIII, par. 19, says in like manner : « By these words He (Our Lord) showed that marriage was instituted by God, so as to be the union of two persons only, and not of more than two ». Finally, in agreement with this are the

1. O. c., p. 166.

words of *Nicholas the Great*, in his reply *ad consulta Bulgarorum*, c. 51 (*Migne CXIX*, col. 999) : « To have two wives at the same time is not permitted *either by the original condition of the human race, or by the Christian law* ».

177.
but was
relaxed under
the Old Law,

II. In the Old Law, this prohibition emanating alike from the divine law and from the secondary natural law was removed *by a dispensation*. This is evident 1. from the words of *Deuteronomy*, XXI, 15, 16 ⁽¹⁾, where Scripture clearly assumes the lawfulness of polygyny ; 2. from the *example of the Patriarchs*, who, unblamed by the Scriptures, had several wives at the same time ⁽²⁾ ; 3. from the words of *Innocent III*, which we have just quoted, c. 8, X, IV, 19.

It is generally taught that the dispensation in question was introduced after the deluge in favour of the Jewish race ⁽³⁾, and according to St. Thomas, it was made known by divine inspiration ⁽⁴⁾.

Nevertheless, this dispensation *directly* given in favour of the Hebrews, *indirectly* and concomitantly benefited the Gentiles. « For the heathens... could easily persuade themselves that it was lawful for them to follow therein the example of just and holy men ; and, having regard to these circumstances, if God had wished to restrict this privilege to the faithful people alone, to the exclusion of all others, He would have said so distinctly, so as to

1. « If a man have *two* wives, one beloved, and the other hated, and they have had children by him, and the son of the hated be the first born,... he may not make the son of the beloved the first-born, and prefer him before the son of the hated ».

2. Among the wives one was of higher dignity than the others, who were often called *concubines*, not as if they were unlawful, but because they held a lower wifely rank. Cf. PESCH, o. c., VII, nos 832 s.

3. Observe, however, that in the Mosiac law, *Deut.*, XVII, 17, the number of wives was already limited to a certain extent. See *Coll. Brug.*, t. XIII, p. 260 s., and the *Realencykl.*, t. V, p. 744, showing that monogamy was in accord with the desires of Jewish legislation. See also WATKINS, o. c., p. 46 ss.

4. « Lex autem de unitate uxoris non est humanitus sed divinitus instituta, nec unquam verbo aut litteris tradita, sed cordi impressa ; sicut et alia quae ad legem naturae qualitercunque pertinent ; et ideo in hoc a solo Deo dispensatio fieri potuit per inspirationem internam, quae quidem principaliter Patribus facta est, et per eorum exempla ad alios derivata est ». *Supplem.*, qu. LXV, art. 2.

avoid giving a reasonable pretext for shameful concubinage » (1). From this we can understand how Esther, at the instigation of Mardochai, permitted herself to be united to king Assuerus, though he was already married.

III. Finally, arguments are not wanting to show that Christ brought marriage back to the original limits of monogamy, and made those limits obligatory and exclusive.

178.
and definitively re-established by Christ,

1. Matth., V, 32, and XIX, 9, taken in conjunction with Mark, X, 11 and Luke, XIV, 18, show that the man who, being married, puts away his wife and takes another commits adultery; consequently a second marriage is invalid as long as the first endures. The *Catech. of the Council of Trent*, l. c., does not fail to make use of these texts, and concludes from them that it is no more lawful for a husband to have two wives at once in his house, than to put away his wife and to take another.

2. The evidence of *the Fathers*, cited by PESCH, o. c., VII, n° 825, to which may be added the text of Nicholas the Great, given above, is quite explicit on this point.

3. The *Councils* expressly teach the same. At the second Council of Lyons, the profession of faith of Michael Palaeologus declares: « As regards marriage, it (the Holy Roman Church) holds that a man may not at the same time have more than one wife, nor a woman more than one husband » (2). At the Council of Trent, the second canon of Session XXIV pronounces anathema against anyone, who maintains « that it is lawful for Christians to have more than one wife at the same time, and that the practice is forbidden by no divine law ».

We may further adduce the declaration of the C. S. O., in its *Instr.*, of 1866, quoted above, as also in its *Instr.*, of 28 March 1860 (3).

1. PALMIERI, o. c., p. 118 s.

2. DENZINGER, o. c., n° 465.

3. *Collectanea*, n° 1297: « Certissimum est *polygamiam* jure evangelico esse omnino illicitam; unde, postquam Jesus Christus matrimonium ad pristinam reduxit sanctitatem, unitatem et indissolubilitatem, addita pro baptizatis sacramenti dignitate, nec infidelibus, nec Judaeis, nec ulli mortalium licuit plures sibi copulare uxores. Consequenter divinitus sic restituta monogamia, nonnisi unam uni legitimo validoque conjugio devinciri posse inconcussum fidei dogma habetur ».

even for infidels.

The documents of the Holy See, and especially the above-mentioned instructions of the C. S. O., clearly show, as we have seen, that the law of monogamy, re-established by Christ, is binding not only on Christians but also on *infidels*.

The reason of this is, as BILLOT shows ⁽¹⁾: « firstly, because the words: *whosoever shall put away* etc. (Matth. XIX, 9) are unlimited in their application; secondly, because the natural law binds alike the unbaptized and the baptized, and this law naturally resumes its full force in respect of all, when the dispensation which permitted polygamy has been withdrawn ⁽²⁾; finally, because this dispensation directly affected the faithful alone, and all others only concomitantly » ⁽³⁾.

ARTICLE 2. The indissolubility of the conjugal bond.

This article is divided into four sections. In the *first* and *second* we shall treat in general of the law of indissolubility in the light of the natural law and of the positive divine law; in the *third* we shall speak of the various derogations from this law; and finally, in the *fourth*, we shall show the absolute indissolubility of marriage

It is well known that Luther and Melancthon held that polygamy was not contrary to the Scriptures, and that they permitted bigamy in the case of Philip of Hesse. They also recommended a like course to Henry VIII of England, and advised him, instead of seeking a declaration of nullity of his marriage with Catherine and divorcing her, to take a second wife, while still retaining the former. It seems also that Clement VII, in the case of Henry VIII, showed some hesitancy on the question of its strict and indispensable prohibition by Holy Writ. Cf. GRISAR, *Luther*, II, p. 374 ss., coll. p. 213 ss.

1. O. c., p. 378.

2. « Dicendum quod habere plures uxores est contra legem naturae, cui etiam infideles sunt adstricti; et ideo non est verum matrimonium infidelis nisi cum illa cum qua primo contraxit ». St. THOMAS, *Suppl.*, qu. 59, art. 3, ad 4.

3. As a matter of fact polygamy still flourishes in several non-christian nations, and even in one sect that calls itself Christian, viz., that of the Mormons. See C. WILLEMS, o. c., p. 389.

We should add that in most polygamous nations polygamy has certain monogamistic tendencies: one of the wives has precedence over the others, and to some extent enjoys the rights of a lawful wife. Often also each wife has a separate abode and constitutes, as it were, a distinct family. Cf. LEROY, *Religion des Primitifs*, p. 101 s.; HOWARD, o. c., I, p. 134.

ratum et consummatum. This will be followed by a *supplementary notice* on civil divorce.

PARAGRAPH I. THE LAW OF INDISSOLUBILITY BEFORE THE
NATURAL LAW.

PROPOSITION. *Marriage is indissoluble by the natural law : arbitrary dissolubility, at the mere caprice of the parties, is opposed to the primary natural law ; dissolubility restricted within certain limits is contrary to the strictly prohibitive secondary natural law.*

179.
*Arbitrary
dissolubility
of marriage
is opposed to
the primary
natural law.*

Explanation and demonstration.

I. The *arbitrary* dissolubility of marriage, preached by the advocates of free love, is in opposition to the *primary* natural law. For, this system means the ruin of married life and of the family, and so of society also. Arbitrary divorce does away with the proper end of marriage, that is to say, the procreation and right education of children. The attainment of this end requires, for a long space of time, the *constant* and *common* solicitude of the *father and mother*. There must therefore be a bond, which, if not perpetual, is at least lasting and secure to bind husband and wife together in such a manner, that neither the one nor the other is free to break it capriciously at any moment (¹).

II. As regards dissolubility *restricted* and *limited* to certain determinate causes and circumstances :

1. Such dissolubility is not repugnant to the *primary* principles of the natural law ; for neither the essence of marriage nor the attainment of its *principal* end necessarily requires *absolute* indissolubility. Thus, this principal end, the generation and education of children, would not be radically ruined, if it were lawful to dissolve the marriage when the work of education had been completed.

180.
*Restricted
dissolubility
is opposed to
the secondary
natural law.*

But, 2. *restricted* dissolubility is in opposition to the *secondary* principles of the natural law. If it does not tend to destroy marriage in its essence, and so to undermine society itself, it is nevertheless of a nature to injure seriously the partnership of marriage. If we look at things *per se*, and *in their generality*, outside of strict indissolubility, the stability of the union between husband and

1. See above, nos 48 and 49.

wife and their mutual fidelity are adversely affected by it ; the dignity of the wife and the education of the children suffer, so that the end of marriage, though still remaining possible, becomes more difficult of attainment. Let us develop this idea :

a/ No one will deny that the prospect of a new marriage and of a new family *will render parents less solicitous in providing for the welfare* of the children by the existing marriage, and that the lot of the children is truly lamentable when their father and mother are divorced from one another, and have contracted fresh marriages ⁽¹⁾.

b/ Then again *mutual love* between husband and wife will *weaken*, and *conjugal fidelity* be diminished, as a direct consequence of the possibility of divorce.

In the nature of things, the stronger the marriage bond is, the less it can be tampered with, the closer will be the union of hearts, the greater will be the effects of mutual love, the better disposed will husband and wife be to bear with one another's shortcomings and to avoid occasions of discord ⁽²⁾. On the other hand, if separation is regarded as a possibility that may be realised, intimacy slackens, love grows cold, especially on the part of the partner contemplating a new alliance, and 'a frivolous pretext suffices to turn it into aversion and hate ⁽³⁾. The mere possibility of dissolution causes marriage to be entered upon lightly, without any serious proof of one another, and without looking for a well fixed

1. Cf. COMBIER, o. c., p. 437 s. ; DIDON, o. c., p. 31-34 ; MONSABRÉ, o. c., p. 65-67 ; SALSMANS, o. c., p. 30 ss. ; BÖCKENHOFF, o. c., p. 68 s. ; DE SMET, *Over de Echtscheiding*, p. 81.

2. « Erit fidelior amor unius ad alterum, dum cognoscunt se indivisibiliter conjunctos ; erit etiam utriusque sollicitior cura in rebus domesticis, dum se perpetuo commansuros in earundem rerum possessione existimant ». St. THOMAS, *C. Gent.*, l. III, c. 123. The *Catech. of the Council of Trent*, P. II, c. VIII, par. 21, in like manner says : Once the faithful realise that, even if separated as to bed and board, they are still bound by the marriage bond, and that all hope of a second marriage is cut off, they are less ready to give way to anger and discord ».

3. « Le divorce est un obstacle à l'union des âmes, à l'affection mutuelle, à la confiance réciproque qui fait la dignité du mariage ; il s'oppose à l'attachement véritable des époux l'un pour l'autre, car on ne s'attache véritablement que quand on est sûr de pouvoir être toujours attaché ». COMBIER, o. c., p. 431. See also DIDON, o. c., p. 41-44 and MONSABRÉ, o. c., p. 59-61, whose eloquence extols the perpetuity and indefectibility of conjugal love ; SALSMANS, o. c., p. 29 s.

mutual affection (¹). Finally the very possibility of a fresh marriage makes married people less inclined to shun unlawful amours, and even serves as an incitement to infidelity (²).

c/ We can now easily understand that *the dignity of the wife* is here at stake, and that the dissolubility of marriage exposes her to contempt and distress. Divorce has, in fact, far graver consequences for the woman than for the man. See the author's brochure, *Over de Echtscheiding*, p. 11 s. (³).

The conclusion drawn from this is that the general good, and social order demand that divorce should be forbidden, and that the indissolubility of the conjugal bond should be safeguarded.

It may, indeed, be admitted that, in certain exceptional cases and within well defined limits, the power of divorce would not be gravely injurious to the stability of marriage and to that of social order; but in order that strict indissolubility may be part of the natural law, it is enough that it is, if we look at things *per se* and *in their generality*, the only effective guarantee of the stability of the family.

Now, if there are grounds for granting a dispensation in certain exceptional circumstances, for a definite class of marriages, in view of special circumstances, it is *to God*, and *to Him alone*, that

1. Cf. SALSMAANS, O. C., p. 28 s.

2. « Le mariage, dit Balmès, en assignant à la passion un objet légitime, ne tarit pas cependant la source d'agitation que le cœur recèle. La passion affadit, la beauté se fane, les illusions se dissipent, le charme disparaît. L'homme en présence d'une réalité qui est loin des rêves auxquels se livrait son imagination de feu, sent naître dans son cœur des désirs nouveaux... Lâchez alors la bride aux passions de l'homme; permettez-lui d'entretenir le moins du monde l'illusion qu'il peut chercher le bonheur dans de nouveaux liens; laissez-lui croire qu'il n'est pas attaché pour toujours à la compagne de sa vie; vous verrez que le dégoût s'emparera de lui plus promptement..., les liens commenceront à s'user à peine formés et se rompent au premier choc ». COMBIER, O. C., p. 440. « A celui que tourmente une passion adultère, elle (la loi de l'indissolubilité) dit: Prends garde, tu ne t'appartiens plus. Le divorce, au contraire, encourage le cœur infidèle et lui dit: Va où l'amour t'appelle, tu peux te reprendre ». MONSABRÉ, O. C., p. 90.

3. Cf. MORIZOT-THIBAUT, *La femme et le divorce*, dans la *Réforme Sociale*, t. 42, p. 195 s.; PEYTEL, O. C., p. 187 s.; BÖCKENHOFL, O. C., p. 72-76. See on the other side NAQUET, *Vers l'union libre*, ch. 5, where he endeavours to show that divorce is needed in the interest of the wife.

it belongs to do so, as we have said above in n° 172. No man has the authority to do it.

Moreover, no *purely human* authority *would be capable* of restriction to the narrow limits within which the power of divorce would be compatible with the general good.

Taking into consideration the inconstancy of man, his inordinate desires and his aversion to trouble and difficulties, the power of granting divorce would inevitably extend still more and more, until it ended in *free union, free love* ⁽¹⁾ and the *suppression of all permanent marriage*. Here, then, we have the logical consequence that the defenders of indissolubility advance against the advocates of divorce ⁽²⁾; here too the ideal that the advocates of divorce professedly aim at ⁽³⁾; to this the current of popular opinion is

1. *Free union* is the union of man and woman contracted without the intervention of any social authority, and dissoluble at the will of the parties. *Free love* goes further than this; for, while free union preserves some appearance of marriage and wedded life, and leaves to the parents the care of the children, free love supposes communism, the handing over of the children to the care of the community, and the matriarchate. Cf. LOSLEVER, o. c., p. 24 ss.

2. « Continere divortia intra provisos terminos tam difficile factu est quam sistere in medio cursu acerrimarum flammæ cupiditatum ». LEO XIII, in his Allocution of the 16 Dec. 1901. Cf. *Collat. Brug.*, t. VII, p. 169 s.

« En opposant la liberté individuelle à l'indissolubilité du mariage, vous ne tarderez pas à aller plus loin que la loi de 1803, plus loin que la loi de 1792, vous arriverez à la doctrine de l'union libre, c.-à-d. à la ruine de la société domestique ». Discourse of *Mgr. Freppel*, 13 June 1882, in RIBEROLLES, o. c., p. 103. *Brisson* also, as given in the same work, p. 96, reasoned in the same way when he said: « Ne vous contentez pas du divorce par consentement mutuel, mais introduisez dans la loi le divorce par la volonté unilatérale; car c'est par là seulement que vous pourrez parvenir à affranchir les époux des véritables douleurs du mariage; mais alors, si vous demandez le divorce par volonté unilatérale, mieux vaudrait rendre l'union libre et abolir le mariage lui-même ». Cf. also LEMAIRE, o. c., p. 167 s.; DIDON, o. c., p. 67-70.

3. Thus NAQUET, through whose instrumentality divorce was introduced into France in 1884, bluntly avows that free union and free love are the ideals to be aimed at. In the columns of the *Journal* of 8 June 1908 he wrote: « Je suis convaincu que nous marchons vers l'union libre, c.-à-d. vers l'abandon de toutes les formalités administratives et de toutes les entraves judiciaires qui obstruent à cette heure les portes d'entrée et de sortie du mariage ». See also his brochure, *Vers l'Union libre*, ch. 2 and 7. Cf. AVIGDOR, o. c., p. 290; RIBEROLLES, o. c., p. 152 s.; ABRAM, o. c., p. 109 s.; NYSTRÖM, o. c., p. 231 s. and 257 ss. The *Socialists* have the same end in view.

strongly tending⁽¹⁾, as daily experience only too clearly shows⁽²⁾.

We may therefore look upon the following conclusion as fully

Many other writers, convinced that the moral situation is not at present ripe for free union and free love, do all in their power to facilitate divorce and to make it readily obtainable, even at the will of the one party. In the front rank of this unfortunate campaign are Paul and Victor MARGUERITE; see their pamphlet, *l'Elargissement du Divorce*, and their work, *Les Deux Vies*. Their cry is not *free love*, but *free marriage*. Cf. BÉCHAUX, *Réforme Sociale*, (1903), t. 45, p. 111 s.; read also HAMBURGER, o. c.; ABRAM, o. c., who sets forth his own opinion, p. 208 ss.; BESSE, o. c., n. 343 ss.; SCHAUB, p. c., p. 28 ss.

The patrons of the German school known as « *Neue Ethik* » write freely in the same sense. According to them it is for love alone, the intimate union of hearts, to rule and regulate marriage; as long as that love endures, the conjugal union will spontaneously endure; but when it disappears, the only thing is to break the marriage tie, which could then only serve as the sanction of an abnormal and immoral state of affairs. Cf. BÖCKENHOFF, o. c., p. 22 s.; LICHTENBERGER, o. c., p. 210-225; KNOCH, *L'Education*, p. 18 ss.

1. The popular tendency in this direction grows ever more and more, fed, as it is, by the shameless novels and plays, spoken of by AVIGDOR, o. c., p. 239-310; ABRAM, o. c., p. 121 s., and BÖCKENHOFF, o. c., p. 20, who says: « dass von 80 modernen Romanen, 17 die Ehe als eine überlebte Institution lächerlich machen, 11 von der Nützlichkeit der Ehescheidung handeln, 22 die freie Liebe verteidigen, 7 sich über die eheliche Treue lustig machen, und 23 sogar von der Ehe in geradezu skandalöser Weise sprechen ». See the discussions on this subject in the Belgian Chambers, in 1904-1905 and 1905-1906. Cf. the *XXe Siècle*, 19 nov. 1904 and 3 Feb. 1907; AVIGDOR, o. c., p. 239-310.

2. Divorce was introduced into France in 1792, and rendered more and more accessible by ever widening legislative concessions, so that the legislators themselves at last became alarmed at the enormous number of households broken up. See below, no 203c, towards the end.

For the existing situation, see KNOCH, *Rev. eccl. de Liège*, 1905-1906, p. 326-336, and especially JACQUART, o. c., according to whose calculation the number of divorces pronounced in Belgium increases from year to year; in 1870 it was 81; in 1890, 373; in 1907, 841 (p. 14 s.); in 1908, 892; while in 1910 it reached 1039. The author goes on to compare the different nations with one another in this respect. In France, on an average, more than 10,000 divorces are pronounced in a year; in Germany, over 13,000 (according to SCHAUB, o. c., p. 36, in 1908 the exact number was 13,327); in the United States, more than 60,000 (p. 73), (72,062 in 1906, according to the abstract given by LICHTENBERGER, o. c., p. 67), and over 100,000 in Japan. See also C. WILLEMS, o. c., p. 398 s.; *Archiv. f. k. Kirchenw.*, 1909, p. 756 s.; SCHULZE, o. c., p. 709 ss.; *The Cathol. Encyclop.*, under *Divorce*, t. V, p. 68; DETREZ, o. c., who, on page 280, gives a specimen of a letter announcing a divorce, written on the same lines as an announcement of marriage; cf. also BESSE, l. c., p. 347.

demonstrated: the good of society as a whole, and consequently the natural law, demand that marriage should be indissoluble, and that no human authority should have it in its power to dissolve the marriage bond.

Note. 1. Divorce is injurious to society on more than one head, for it not only affects marriage, but also favours immorality, even apart from the violation of the nuptial law. This is pointed out by the infidel writer, MORSELLI, *Per la polemica sul Divorcio*, Genoa, 1903 ⁽¹⁾: in proportion to the number of divorces crime of every kind increases, especially suicide, prostitution and so forth ⁽²⁾.

2. Leo XIII wrote some memorable pages on the indissolubility of marriage, in which he clearly showed the evil of divorce and its sad consequences. Besides the Encyclical *Arcanum* ⁽³⁾, already referred to, the Papal Allocutions of 16 Dec. 1901 and of 24 Dec. 1902 (*Anal. eccl.*, 1904, p. 181) should be consulted. See also the Instruction to the Bishops of Italy, of 24 Dec. 1901 (*Canon. Cont.*, 1902, p. 226 ss.).

181.
Objections.

There is evidently no lack of opposition to the doctrine which we have just established. The following are the more common **objections** raised against it:

1. There is a well known saying to the effect that *the same causes that produce a result are sufficient also to do away with it*: and therefore, just as marriage is contracted by the mutual consent of the parties, so it can also be dissolved by the same.

BILLOT, o. c., p. 389, gives a very good *answer*: « That is quite true of

1. *Rev. du clergé Français*, t. 45, p. 166 ss.; BESSE, l. c., n. 347.

2. « La statistique ascendante des divorces est le thermomètre de la moralité ». These are the words of the socialistic newspaper *Vooruit*, as given in the *Patriote* of 31 Dec 1904. Cf. JACQUART, o. c., p. 55-64 and 78-84; he compares the frequency of divorce with that of suicide, and also with the falling off of legitimate births, and he says: « On constate que la fréquence du divorce coïncide dans l'ensemble avec un taux élevé de suicide et une faible natalité », p. 57 and p. 78. Cf. also KNOCH, *L'Education*, p. 40 s.

3. « It is hardly possible to say how great are the sources of evil to be found in divorce. Marriage contracts are thereby made changeable; mutual kindness is weakened; pernicious inducements to unfaithfulness are supplied; injury is done to the education and bringing up of children; occasion is given for the destruction of homes; the seeds of dissension are sown among families; the dignity of women is lessened and brought low ». *Authorised Translation*, London, 1880.

contracts that concern only the *private* advantage of the contracting parties ; in such a case either party is free to renounce his right, and to liberate the other from his engagement. But in the case of marriage the obligation concerns the *common good* and has relation to the normal propagation of the human species ; and so, though this obligation is subject to the free will of the contracting parties at the moment that they assume it, it ceases to be so from the time that it is assumed ; for, if it is assumed, it is necessarily assumed in conformity with its nature ; but the natural law, having in view the common good, requires that it should be lasting, and that it should have all the conditions of stability ».

2. The indissolubility of marriage fetters and insults the liberty of man.

Answer. Liberty is not the end of man, but only a means to it ; hence this liberty is the more perfect, as it conduces the more surely to the proper end of man. But we have sufficiently shown how useful and even necessary this indissolubility is for the safeguarding of the natural law, and how the liberty of husband and wife has need of its salutary restraint to prevent them from giving way too readily to feelings of weariness and impatience, and from lightly throwing off the marriage yoke ⁽¹⁾.

3. The union of husband and wife will be all the more intimate and consequently more lasting, if it is quite spontaneous and free from constraint of any kind.

Answer. We quite agree that if the conjugal union is to be intimate, it must be spontaneous in its origin, that is to say, that the parties interested ought to choose their respective partners in accordance with their free and individual tastes. But in order that such intimacy may *continue and remain unshaken* after marriage, there is need of a new element, viz., a bond that really binds, to strengthen the parties against temptations that are always possible, and against the transitory difficulties that may arise ⁽²⁾.

1. The same argument is applicable to the perpetual vows taken by religious, for the very purpose of advancing with greater security and constancy in the way of perfection, and to avoid the temptation of turning back in the face of any transient difficulty or disgust.

« J'ai fait des vœux, moi, says DIDON, o. c., p. 151, des vœux éternels ; eh bien, dans ma foi d'honnête homme, mes vœux me gardent, mes promesses me lient. Et vous croyez que si on avait des vœux d'un jour, on résisterait !.. Au premier vent qui souffle, on aurait besoin d'aller voir ce qui se passe sur ces plages embaumées vers lesquelles nous invite la brise. Mais non, on résiste, lié par cette chaîne terrible du serment irrévocable, suprême garantie contre la faiblesse de l'homme doutant de lui-même ! ». See also BONOMELLI, o. c., p. 50 s. ; BESSE, l. c., p. 332 s.

2. « Et vous oseriez dire, says DIDON, o. c., p. 159 s., que dans le contrat conju-

4. But the very dissolubility of marriage would provide the desired check and cement mutual affection even better than its indissolubility. For who does not see how easy it is for a husband of bad disposition to take advantage of the obligation that his wife is under, to annoy her with greater security ?

Answer. We do not deny that this may sometimes happen ; and a heartless husband would, perhaps, treat his wife with more respect, if he knew that she could obtain a divorce. But in the first place, she can have recourse to judicial separation as a remedy for the evil ; and, in the second place, these occasional cases, in which the power of divorce would really promote a union of hearts, cannot outweigh the multitude of contrary cases. For, it cannot be denied, in the face of daily experience, that as a matter of fact married people who are free to leave one another, and see their way to a new marriage, are less patient in putting up with one another's shortcomings, and find their love growing remarkably cold. But this has been sufficiently shown in our thesis.

5. There are households in which life in common has become quite intolerable, and where there is urgent need of divorce ⁽¹⁾.

Answer. This again is a case for separation, which will to a great extent remedy the state of affairs.

But, if it is still *urged*, that the lot of the innocent party is made too hard,

gal, lorsqu'on s'unit sans y mettre ce ciment indestructible, l'union sera plus intime ! Quoi ! On se séparera moins aisément, parce qu'il sera permis de se quitter ! ».

1. This is the most common objection raised by the advocates of divorce. It consists in exciting compassion for the innocent party, the unhappy victim of a miserable wretch. See how MONSABRÉ, *o. c.*, p. 83-84, treats it with masterly eloquence :

« Ici, la révélation inattendue de repugnantes infirmités, ou d'un déshonneur que l'on avait tenus cachés ; là, l'explosion soudaine de passions ou de vices habilement contenus ; ici, des défauts qui se hérissent à la moindre contradiction et découragent la plus robuste patience ; là, des habitudes dégradantes qu'on ne sait comment dissimuler, et quelquefois des infamies publiques que la loi châtie ; ici, des haines sourdes qui complotent sans cesse ; là, des colères qui éclatent comme la foudre ; ici, des injures, des menaces, des querelles, des violences, des brutalités ; là, d'abominables perfidies ; ici, l'infidélité enveloppée de ruse et de mensonge ; là, les trahisons de l'amour insolemment installées au foyer domestique ; tout ce qu'il faut enfin pour diviser les esprits, déchirer et désespérer les cœurs, tuer à jamais l'amour. N'est-ce pas ce que l'on rencontre dans une foule de ménages ? Et dans ces bagnes de misères morales et de crimes, vous voulez que l'homme et la femme restent enchaînés l'un à l'autre comme deux forçats traînant le même boulet » ?

being forced to lead a single life through the fault of the other: we admit, that the lot is a hard one, and we understand how the dream of a new alliance might come, perhaps in spite of oneself; but, once more, the law does not lapse because its hand is heavy on some exceptional cases. It looks to the general good, as based on the nature of things; and every law, however good it may be, accidentally treads upon somebody's corns. Private good must give way to the public good, and, under the circumstances, this demands the strict indissolubility of the marriage (1). To break the conjugal bond in a case like this, would be to deprive it of all efficiency for the future (2).

Moreover, like hardships happen in many other matters. Thus the natural law, which forbids the killing of an innocent person, at times demands the sacrifice of life, as for instance that of a mother in the birth of her child, when it cannot be otherwise brought about.

And let us not forget that facilities for divorce tend to increase the number of unhappy marriages, and act as an incentive to hasty, inconsiderate and ill-assorted unions.

6. Married life without mutual love is abnormal, or rather immoral; consequently when love is irremediably lost, the marriage bond ought to be broken (3).

Answer. a/ As we have seen, the perseverance of conjugal love is largely due to the indissolubility of marriage; for engaged parties, with the knowledge that death alone can dissolve their contemplated union, will be careful not to enter on the married state lightly, out of mere passion, and without a sincere assurance of a real and mutual love. And, when once the marriage has been contracted, the consciousness of its indissolubility will protect their affection for one another against the natural inconstancy of their disposition and the blind impulse of passion.

b/ And if, in an exceptional case, cohabitation becomes intolerable, owing to the irremediable loss of love, the solution of the difficulty is to be found above in our answer to the fifth objection.

1. « In legibus matrimonii magis attenditur quid omnibus expediat quam quid uni competere possit ». ST. THOMAS, *Suppl.*, qu. LXVII, art. 1, ad 4.

2. « Qu'il y ait des inconvénients à maintenir l'indissolubilité des unions mal assorties, des ménages malheureux par incompatibilité d'humeur ou d'intérêts, nul ne songe à le nier; mais la question est de savoir si les intérêts supérieurs de l'ordre religieux et social ne sont pas plus grièvement lésés par le divorce que par le mariage perpétuel ». JAUGEY, *Dictionnaire apologétique*, p. 882. See also BOURGET, *Un divorce*, p. 26 s.; COMBIER, o. c., p. 448 s.; SALSMANS, o. c., p. 32 s.

3. BÖCKENHOFF, o. c., p. 79 s., gives an excellent exposition of this objection from the standpoint of the « *Neuer Ethik* ».

7. The *good of the children* requires that the marriage should be dissolved when the parents are involved in continual quarrels (¹).

Answer. The remedy in such a case is rather to be found in separation than divorce ; for though both measures alike put an end to these domestic scenes, the former is more advantageous to the children, since their father and mother will be better able to attend to their education, if they remain separated without marrying again, than if they were divorced and became severally occupied with the care of children by another marriage.

8. But at least divorce ought to be permitted where there are no children ; for then the good of the children, which is the basis of indissolubility, is not in question.

Answer. a/ The good of the children is not the only advantage that comes from the indissolubility of marriage. b/ Even where there are no children, we must remember that marriage is to be considered in its normal and natural conditions, rather than in conditions that are accidental and foreign to its proper functions. But it is certain that sterility is not natural to marriage, but, relatively to its office, of an accidental nature. c/ Finally, if divorce were permitted where there are no children, married people might be inclined to shirk the duty of procreation for the purpose of obtaining it (²).

The 67th proposition of the Syllabus.

Corollary. If the indissolubility of marriage by the natural law is thus understood, we shall see that the 67th proposition of the *Syllabus* was rightly condemned by Pius IX (³). Even if it is taken *part by part (in sensu diviso)* this proposition is false, in that its first clause denies this indissolubility of marriage in the natural law.

P. VIOLETT is therefore wrong in declaring that this proposition was condemned only *as a whole (in sensu composito)*, and in concluding from that, that one may maintain that marriage is not indissoluble by the natural law, but that one may not affirm that marriage is dissoluble by the natural law *in such a way* as to make lawful the introduction of divorce by the civil authority (⁴).

1. NAQUET develops this idea in his brochure *Vers l'Union libre*, ch. 4.

2. Cf. BÖCKENHOFF, o. c., p. 71.

3. This proposition is taken from the Apostolic Letter of Pius IX, of the 23 Aug. 1851, *Ad Apostolicæ Sedis*, and is as follows : « Jure naturæ matrimonium non est indissolubile, et in variis casibus divortium propriè dictum auctoritate civili sanciri potest ». DENZINGER, o. c., n° 1767.

4. *L'Infaillibilité du Pape et le Syllabus*, Paris, 1904 ; likewise the *Etudes Religieuses*, 1905, (vol. 83), p. 255-260, where he writes : « J'avais eu soin, quant à moi, de faire entendre que, si la proposition 67 est examinée et

There is no necessity to have recourse to the explanation given by Boudinhon ⁽¹⁾ : the proposition which maintains the indissolubility of marriage by the natural law, is only true, according to him, if restricted to marriage *ratum et consummatum*, since such a marriage is the only one that is absolutely indissoluble and never capable of dispensation ⁽²⁾.

PARAGRAPH II. INDISSOLUBILITY BEFORE THE POSITIVE DIVINE LAW.

PROPOSITION. *The principle of indissolubility, resting on the natural law, was sanctioned by the positive divine law, both under the regime of the original institution of marriage and under the economy of the Gospel.*

Demonstration.

A. The original institution of marriage implies the indissolubility of the conjugal bond. This is clear from the words uttered by Adam (already quoted above), when he was joined in marriage with Eve, *Gen.*, II, 24 : « Wherefore a man shall leave father and mother, and shall cleave to his wife, and they shall be two in one flesh ».

182.
Marriage is indissoluble by the divine law : a) according to its original institution ;

These words clearly establish the law of indissolubility.

1. The terms employed express it.

2. Our Lord's interpretation of them (*Matth.* XIX, 3-8) enforce it. To the question of the Pharisees : « Is it lawful for a man to put away his wife for every cause ? », Christ answered : « Have ye not read, that He who made man from the beginning, made them male and female ? For this cause shall a man leave father and mother, and shall cleave to his wife, and they shall be two in one flesh. Therefore now they are not two, but one flesh. What therefore God hath joined together, let no man put asunder ». But

étudiée tout entière *sic*ut jacet, et non par morceaux découpés, elle accuse son caractère erroné, parce qu'on sent de quelle manière la première partie de la proposition doit être entendue ; cette première partie sera dès lors considérée comme servant à justifier le divorce ».

1. *Revue du Clergé Français*, 1905, vol. 43, p. 419-420.

2. As we have clearly shown, marriage is rightly said to be indissoluble by the natural law, though this indissolubility, inasmuch as it excludes restricted dissolubility, rests only on the secondary natural law, and consequently is not absolute and beyond all dispensation.

when the Pharisees, unwilling to acknowledge defeat, alleged the bill of divorce, Our Lord added : « Moses by reason of the hardness of your heart permitted you to put away your wives ; but *from the beginning it was not so.* »

3. The interpretation of the *Council of Trent*, Sess. XXIV, *Doctrina de sacramento matrimonii*, confirms this teaching : « The first parent of the human race, *under the inspiration of the Holy Spirit*, declared the perpetuity and indissolubility of the bond of marriage, when he said : This now is bone of my bones, and flesh of my flesh ; wherefore a man shall leave father and mother, and shall cleave to his wife, and they shall be two in one flesh ».

b) according
to the evan-
gelical law.

B. In the New Testament, Christ proclaimed the same principle, and moreover brought back to its pristine holiness the primitive law of marriage, which had been sensibly relaxed under the Mosaic dispensation.

This truth is clearly contained not only in the texts which we have just quoted, but also in *Matth.*, V, 42, XIX, 9 and in the parallel passages of *Mark*, X, 11, and *Luke*, XV, 18 ; in *1 Cor.*, VII, 10 and 11, and in *Rom.*, VII, 2 and 3. The Synoptics, in truth, repeatedly affirm that the man who puts away his wife and takes another, commits adultery. We shall see this yet more clearly below in n° 199, where we shall explain these texts and solve the difficulty contained in them. St. Paul insists that the wife is bound to her husband as long as he lives, and that she becomes free only on his death ; apart from this hypothesis, if she is separated from her husband, she must either lead a single life or be reconciled with him.

PARAGRAPH III. DEROGATIONS FROM THE LAW OF INDISSOLUBILITY.

183.
This law is
capable of
derogation.

Keeping in mind the explanations that we have given in n° 172, and the principles there established, it is evident that no man, nor even God himself, can dispense, by a general measure, from the law of indissolubility, in so far as it derives from the *primary* principles of the natural law, i. e., so as to permit *arbitrary* divorce, dependent upon the mere whim of the parties.

Furthermore, no purely *human* power is competent to dispense from this same law, in so far as it derives from the *secondary*

natural law, positively confirmed by God. No human authority, therefore, is empowered to dissolve *in any way whatsoever* a marriage that has been validly contracted, or to determine beforehand reasons, *however limited they may be*, for the breaking of the conjugal bond ; for, human authority has no power to derogate either from the secondary natural law or from the divine law. But *divine* authority can permit, even by a general dispensation, *in certain well defined circumstances*, the dissolution of the marriage bond ; and we have seen that this divine power can be exercised either directly by God Himself, or mediately *through the agency of the Church*, acting as the instrument and minister of God.

Observe that in the case of the Church there is no reason to fear, as in the case of the State, an abuse of power or an excessive tolerance in the matter of divorce, exceeding the strictly prescribed limits ; for, the Church is armed with divine power and directed by the Holy Spirit ; it has spiritual weapons that are effective in another way than human means for overcoming the passions ; moreover, popular opinion has little or no influence on its decisions ; and the experience of twenty centuries stands as a proof of its wisdom and firmness.

We will now explain how, and to what extent, God has derogated from the law of indissolubility.

FIRST POINT. DISSOLUTION OF THE MARRIAGE BOND BY THE ANCIENT BILL OF DIVORCE.

In accordance with the rules of Deuteronomy, XXIV, 1-4, a Jew was permitted to repudiate his wife by means of a writing attesting the repudiation : « If a man take a wife, and have her, and she find not favour in his eyes for some uncleanness, he shall write a bill of repudiation, and shall give it in her hand, and send her out of his house. And when she is departed, and marrieth another husband, and he also hateth her, and hath given her a bill of divorce, and hath sent her out of his house or is dead, the former husband cannot take her again to wife, because she is defiled, and is become abominable before the Lord ».

For the right understanding of this provision the following observations must be made.

1. It is here a question of the dissolution of the conjugal *bond* ; for, the text supposes that the repudiated wife can marry again, and it

184.
*Divorce by
bill of
repudiation.*

speaks of another *husband*. Christ suggests the same in *Matth.*, XIX, 8, where He says, without restriction, that the bill of divorce was permitted by Moses (1).

2. We must look upon the permission as given, not for *arbitrary*, but only for *restricted* divorce, derogating from the secondary natural law, not from the primary. For the husband had not the right of putting away his wife at will, but for a well defined reason : for some « *uncleanness* », as the text says ; the Hebrew word employed here signifies *nakedness*. The scope and exact meaning of this word were formerly, and still are, the occasion of a good deal of controversy ; some, following the School of Schammai, regarded it as signifying a moral stain, especially adultery (2) ; while others, with the School of Hillel, understood it of some bodily defect, even a slight and futile one (3). The controversy still exists among the Jews (4). Moreover, *Deuteronomy*, XXII, 13-19 and 29, places restrictions on this permission. Cf. *Realencykl.*, V, p. 744 s. ; LUCKOCK, o. c., p. 174 ; and ENGERT, o. c., p. 50 s. The last named author, on page 49, speaking of the prohibition against the first husband taking back his repudiated wife, when she has contracted a second marriage in the interval, interprets this provision as a restrictive clause of repudiation (5).

1. THEOL, MECHL., o. c., n° 55 ; PALMIERI, o. c., p. 127-136. LUCKOCK, o. c., p. 24 ss., maintains the contrary. See VILLIEN, *Divorce*, l. c., col. 1459, who rightly remarks that the text of *Deuteronomy* did *not* introduce the custom of repudiation, but only regulated and tempered an existing custom. Cf. also BLAU, o. c., p. 16.

2. Adultery, according to the prescription of the law (*Lev.*, XX, 10), was punished with death, but this sentence was not, as a rule, carried out. Cf. BLAU, o. c., p. 25, where, as also in the following, the author shows that adultery was a cause of repudiation, and the only one according to the popular practice and the School of Schammai being in conformity with it.

3. It seems certain in any case that the Jews dealt with the interpretation of this text in such a way that at the close of the Mosaic law a much less grave reason sufficed for the repudiation of a wife, than at the period when the law of *Deuteronomy* was in full force. This was stern, as appears from the restrictions that it placed on the power that it granted ; but the term employed to designate the sufficient cause, « *erwath dabhar* » is susceptible of various significations. As ENGERT, l. c., p. 49, observes, it was « *ein... alles mögliche seinem Wortlaut nach in sich fassender Begriff* ». Consult also SCHERER, o. c., II, p. 542, n° 5 ; *Nowack's Handcommentar zum alten Testam. — Das Deuteron.*, STEUERNAGEL, Göttingen, 1898, on this passage.

4. As to both Schools and their doctrine concerning the cause of repudiation, see BLAU, o. c., p. 31 ss.

5. See also ROEDENBECK, o. c., p. 5 ; WATKINS, o. c., p. 52 ss. The code of

The reason why God dispensed the Jews from the strict law of indissolubility was their *hardness of heart*. St. THOMAS, *Suppl.*, qu. LXVII, art. 2, observes : « It was not for the attainment of a greater good, as in the case of the dispensation permitting polygamy, but to prevent an evil, viz., wife-murder to which the Jews were prone ». See also *Gratian*, cap. 7, C. XXXI, q. 1.

SECOND POINT. DISSOLUTION OF THE CONJUGAL BOND BY THE POWER OF THE SOVEREIGN PONTIFF.

PROPOSITION. *The Sovereign Pontiff has the power to dissolve a marriage ratum non consummatum (and, a fortiori, a marriage legitimum non consummatum); moreover, the more probable opinion attributes to him also the power of dissolving marriage legitimum consummatum, on the conversion of one of the parties, and also marriage consummatum et ratum* (1).

Explanation and demonstration.

I. As regards marriage RATUM NON CONSUMMATUM.

A. The existence of this power is no longer in doubt at the present day, since the Pope exercises it readily and without any hesitation (2), which practically amounts to teaching the reality of it (3).

185.
The sovereign Pontiff has power to dissolve marriage ratum non consummatum.

B. Nature and exercise of this power.

1. On the one hand, the Church, in dissolving marriage *ratum*, as we have said above in n° 172, does not exercise a power that

186.
This is a real, though only ministerial power,

Hammurabi also permitted repudiation, but subject to certain restrictive clauses, spoken of by SCHEIL, par. 137-142 and 149.

1. See above, n° 86.

2. Cf. the different examples quoted by DE BECKER, *De Matr.*, p. 418-419, in note.

3. See PALMIERI, o. c., p. 210 s. ; WERNZ, o. c., IV, p. 1024, in the note to n° 698, in which, following Suarez, he explains the probatory force of this practice.

This Papal power was already universally acknowledged in the time of Benedict XIV, as that Pope himself declares in his *Quaest. can.*, qu. 279 : « Henceforth there can be no question as to the power of the Sovereign Pontiff in the matter of dispensing from a marriage *ratum et non consummatum*, since at the present day, as is well known, the affirmative opinion is commonly held by theologians and canonists, and is received in practice ». Cf. KUTSCHKE, o. c., I, p.

belongs to it in its own right, but, so to speak, a *ministerial and instrumental* power, in the name and by the authority of God, to whom alone it belongs to dispense, whether mediately or immediately, from the precepts of the secondary natural law.

On the other hand, the power that the Church exercises is nevertheless a *real power*, and it acts authoritatively in loosening the bond of marriage *ratum non consummatum*, by virtue of the divine authority conferred upon it ministerially, within the prescribed limits ⁽¹⁾. On this subject consult SANCHEZ, o. c., I, II, Disput. 14, n° 6, who at the same time solves the difficulty arising from the sacramental nature of marriage ⁽²⁾.

and in its exercise requires a sufficient reason,

2. The *lawful exercise* of this power requires ;

a/ a *sufficient and proportionate reason*, as a logical consequence of the nature of the law in question. For, the Sovereign Pontiff does not act in this matter on his own proper authority, but exercises a delegated and ministerial power ; whence it follows that an unjustifiable dispensation would be null and void ⁽³⁾.

as well as a juridical proof of non-consummation.

b/ a *complete and juridical proof of non-consummation*.

The absence of consummation may be established either by *corporal inspection*, or by the proof known as *ex coarctata* ⁽⁴⁾, or by

1. Quite recently certain erroneous ideas as to this papal power have come to light. Cf., on the point, FAHRNER, o. c., p. 337 s.

2. « Dum dispensat (S. Pont.) in matrimonio rato, id facit destruendo fundamentum contractus humani...Licet matrimonium ratum sit sacramentum, pendet tamen ex contractu humano tanquam ex fundamento ».

3. Cf. FAHRNER, o. c., p. 331-334 ; KUTSCHKER, o. c., I, p. 312 ss. ; GASPARRI, o. c., II, n° 1081 (the last named gives his authorities and enumerates some of the sufficient reasons) ; SANCHEZ, o. c., II, Disp. 15, n° 6 ; SCHMALZGRUEBER, *In l. IV Decret.*, XIX, n° 51. Read also what we say below, n° 279, viz., that one of the causes admitted in practice is doubtful impotency, or impotency that is only temporary, but difficult to cure.

4. For the proof *ex coarctata* it is necessary to show that the parties, after the marriage, have not been unaccompanied for an instant, or at least that they have been so situated that it was impossible for them to establish conjugal relations. Cf. *Coll. Brug.*, t. XIII, p. 122 s. ; *Canon. Contemp.*, 1908, p. 155 s., ubi narratur matrimonium aliquod fuisse dissolutum qua non consummatum, licet partes fuerint in eodem toro, quia brevi post matrimonium mulier peperit, viro ignorante ejus praegnantiam, quam sane advertisset si uxorem cognovisset ; item *Anal. eccl.*, 1904, p. 120, ubi exponitur causa, in qua constitit de non consummatione ex eo quod sponsa, ipsa nuptiarum nocte, inter choreas et festivitates, pepererit.

the testimony of the parties (¹), corroborated by that of *seven witnesses* on either side (*septima manus*) (²). The proof must be made juridically, by an ecclesiastical judgment in accordance with the prescriptions of the law (³).

When once the decree of the Sovereign Pontiff, dispensing from a marriage not consummated, has been pronounced, the marriage is dissolved, and the parties are severally at liberty to marry again, unless, as sometimes happens, especially in the case of suspected impotency, the judgment carries with it a prohibition to do so *without first consulting the Holy See* (⁴).

The **historical evolution** which the exercise of this power has undergone dates from the time of Alexander III (1159-1181). This was the period

187.
*Historical
evolution of
this papal
power.*

1. Cf. *Les Conférences de Paris*, III, p. 143 s.

2. Recourse is had to the *septima manus* for the purpose of attesting the veracity and credibility of the husband and wife. There are appointed « sept témoins pris du côté du mari et sept témoins pris du côté de la femme, ayant pour mission de déposer chacun en faveur de l'époux qui les a désignés. Ces témoins sont choisis parmi les plus proches parents : le père, la mère, les frères, sœurs, oncles, tantes, neveux ; puis les alliés, et à leur défaut, les voisins, amis et toutes personnes qui ont coutume de converser avec les époux et par là même se trouvent plus au courant de leurs habitudes et de leur vie intime ». BASSIBEY, *Le Mariage devant les Tribunaux*, n° 352 s. Cf. the *Anal. eccles.*, 1908, p. 377, in the *causa Versalien.* ; ESMEN, o. c., I, p. 261 ; SCHNITZER, o. c., p. 350 ; ch. 2, C. XXXIII, 1. See also LEGA, o. c., IV, n°s 460 and 461 ; he observes that the word *manus* (hand) is taken here as the symbol of faith or of loyalty, just as it is the custom to extend the hand in taking an oath and to place it on the book of the Gospels ; see also the same author, n° 477. This kind of corroborative evidence took the place of the ancient proof by lukewarm or cold water and by hot iron. It is employed only in cases of impotency or of non-consummation. Cf. BASSIBEY, o. c., n° 356.

3. The general procedure is described later, where we speak of *Matrimonial Procedure*. For the special formalities concerning corporal inspection and the appointment of experts, consult BASSIBEY, o. c., n°s 403-438 ; LEGA, o. c., IV, n°s 464 s. ; PIERANTONELLI, o. c., II, p. 55-88. This author gives a detailed description of all the steps to be taken in cases of non-consummation. See also below, n° 351.

4. In this last case, the prohibition constitutes an impediment *Vetitum Ecclesiæ*, which is merely of a prohibitory nature. Cf. BASSIBEY, o. c., n° 405. If the party falling under the prohibition wishes to marry, or to take a virgin to wife, the party so wishing must first obtain the permission of the S. Congreg., or the *Venia*, as it is called, which is only granted after a fresh corporal inspection and the receipt of a satisfactory report from the experts.

of the celebrated controversy between the Schools of Bologna and Paris ⁽¹⁾ on the nature of marriage, to which we have alluded above in n° 60. The doctors of Bologna taught that unconsummated marriage, being only an inceptive marriage, is not as yet a sacrament, and that consequently it is dissoluble for a variety of reasons ⁽²⁾; they maintained that the *copula* alone finally conferred on it the sacramental character and indissolubility. The Doctors of Paris, on the other hand, attributed the sacramental dignity to unconsummated marriage, contracted by mutual consent alone, and claimed for it an absolute indissolubility ⁽³⁾.

Alexander III, when he was as yet but Magister Rolandus, had, with all the School of Bologna, upheld the *copulatheoria*, especially in his *Summa* ⁽⁴⁾. But, on his elevation to the Papacy, he adopted an *intermediate* theory, *on the one hand*, granting to unconsummated marriage the quality of a real marriage and of a sacrament, and, *on the other hand*, refusing it the absolute indissolubility claimed for it by the School of Paris. On one side, therefore, *in opposition to the School of Bologna*, he decreed in cap. 3, X, IV, 4, that unconsummated marriage could not be dissolved by a subsequent consummated marriage ⁽⁵⁾, and imposed this solution, « though » as he says, « some think otherwise, and even some of our predecessors have sometimes decided otherwise ». Moreover, he clearly admitted the distinction made by Peter Lombard between *sponsalia de praesenti* and *sponsalia de futuro*, that is to say, between marriage and betrothment, properly so called ⁽⁶⁾. But on the other side, *against the School of Paris*, he decreed that non-consummated marriage is dissoluble, especially on account of a *vow* ⁽⁷⁾ and *subse-*

1. This celebrated controversy had a notable effect on the development of matrimonial law. On this subject see, besides what we have said above, FAHRNER, O. C., p. 123-146; ESMEIN, O. C., I, p. 95-130; SEHLING, *Die Wirkungen*, p. 33-56.

2. These reasons, according to Gratian, were, among others, a vow, fornication, and especially a subsequent consummated marriage.

3. They distinguished between *sponsalia de futuro*, as they said, and *sponsalia de praesenti* (or the actual matrimonial contract), and applied to the former only, the different causes of dissolution which the Doctors of Bologna, who did not make this distinction, admitted in the case of marriage *ratum et non consummatum*. See above n° 60.

4. Thus, in the case of unconsummated marriage, he admitted, among other causes of dissolution, a vow, subsequent affinity, insanity, but not, like Gratian, a subsequent consummated marriage. Cf. FAHRNER, O. C., p. 174, 185 s.

5. Likewise c. 4 (6) and 5 (7) *Compil.* I, IV, 4.

6. C. 6 (8), *Comp.* I, IV 4.

7. C. 2 and 7, X, III, 32; but compare with c. 5 (7), *Comp.*, I, IV, 4.

quently supervening affinity⁽¹⁾, at least when it is public ; in these two cases he permitted dissolution and the contracting of another alliance, provided the former marriage had not been consummated. Finally he expressly declared that the indissolubility of which Christ speaks in the Gospel concerns only the consummated marriage⁽²⁾.

Observe that Alexander III, in establishing this discipline, makes it clear that he looks upon non-consummated marriage, with regard to its dissolubility, as *subject to the power and jurisdiction of the Church*, that he recognises that the Church has the power of *disciplinary* intervention in the causes of dissolution, and of deciding as to the expediency of restricting or extending them.

How can we otherwise explain his action ? In the doubts proposed as to the dissolution of non-consummated marriage he words his decision with « *it seems more safe... more expedient* »⁽³⁾ ; — for the dissolution of such a marriage he appeals to the judgment of the Church⁽⁴⁾ ; — in questions of subsequently supervening affinity he restricts the power of dissolving the marriage to the case in which the matter has become public ; — in certain countries he sometimes refuses dissolution, while he permits it in others on the selfsame grounds, having regard to the diversity of customs⁽⁵⁾ ; — he does not boggle at giving decisions that he knows and acknowledges to be contrary to those of his predecessors (c. 3, x, iv, 4).

In his turn *Innocent III* abolished, as a cause of divorce, affinity supervening after marriage, though it had been admitted as such by Alexander III, and moreover expressed the wish that the *vow* should also lose its dissolving power⁽⁶⁾ ; finally Urban III admitted, as a sufficient cause, leprosy⁽⁷⁾, rejected by Alexander III and Innocent III⁽⁸⁾.

1. C. 2, X, IV, 13.

2. C. 7, X, III, 32.

3. C. 5 (7), 4 (6), *Comp.* I, IV, 4.

4. C. 5 (7), *Comp.* I, IV, 4 : « since... the separation ought not to be made without the judgment of the Church ».

5. C. 2, X, IV, 15.

6. C. 14, X, III, 32 (Friedberg ed.) : in this passage Innocent III seems to lean to the expediency of maintaining the absolute indissolubility of marriage even when unconsummated, and to admit its dissolution by vow only because he does not wish « suddenly to desert the course followed by his predecessors in this matter ».

7. Cf. FAHRNER, O. C., p. 196.

8. Note also Innocent III's way of speaking about the power of a vow to dissolve a *matrimonium ratum*, c. 14, X, III, 32 (Friedberg ed.), and compare with FAHRNER, O. C., p. 195.

It is true that there exists no writing of Alexander III or of Innocent III expressly mentioning this papal power of dissolving unconsummated marriage ⁽¹⁾; but their whole course of action shows that the dissolubility of the marriage bond depends, within certain fixed limits, on the regulations of the Church, as well as the greater or lesser latitude allowed with regard to the causes of divorce. Consequently the practice of the Church shows that the Sovereign Pontiff has the power of dispensing from the marriage in question.

From the beginning of the XIIIth century, several authors undertook the defense of this theory *in express terms*, contrary to the opinion held by many, and especially by the theologians. Later, from the early years of the XVth century, we have acts of the Sovereign Pontiffs, e. g., of Martin V and Eugenius IV, which show the exercise of this power in full play; and from the beginning of the XVIth century, the Church made yet more frequent use of this power, and was supported therein by the ever increasing number of doctors who maintained it, until at last it was universally admitted ⁽²⁾.

An account of the development of this doctrine, together with the arguments employed on either side by writers who lived at the time of the controversy, is given by FAHRNER, o. c., pI, p. 208-215 and p. 316-341; see also ESMEIN, o. c., I, p. 124-135.

188.

The more probable opinion attributes to the Pope the power of dissolving marriage legitimatum, and consummatum et ratum.

II. We now come to marriage LEGITIMUM CONSUMMATUM and to marriage CONSUMMATUM ET RATUM.

The more probable opinion holds that the Pope has also the power of dissolving these two kinds of marriage, marriage *consummatum et ratum* and marriage *legitimum consummatum* ⁽³⁾; provided that, in the latter case, one of the parties has become subject to the jurisdiction of the Church by Baptism.

The reason of this opinion is again to be found in the *practice of the Church*, which by its action seems absolutely to attribute this power to itself. Without this, its way of acting would be inexplicable.

As long as unbaptized persons, validly married, *have not consummated their marriage after their mutual conversion*, it happens that Rome dissolves such a marriage and forthwith permits new

1. Nevertheless, in c. 2, X, IV, 13, in the concession of remarriage, *dispensation* is mentioned. See also GILLMANN, *Zur Geschichte der Kanon. Ehescheidung*, in *Der Katholik*, 1904, t. 29, p. 209.

2. See the text of Benedict XIV, given in n° 185.

3. See above n° 91.

alliances for a variety of causes that are not provided for elsewhere, and especially where the conditions required for the Pauline privilege are not verified, as we shall show below, in n° 196 (¹).

Moreover, it appears from ecclesiastical writings, that marriage *ratum et consummatum* is the *only one* that is considered as absolutely indissoluble and incapable of ecclesiastical dispensation. It is thus that Alexander III, c. 7, X, III, 32, when he permitted a husband, whose wife had entered religion, to marry again during the life of his former wife, justified his action by saying that the words of Christ inculcating absolute indissolubility applied only to marriage *ratum consummatum* (²).

Now, of the two kinds of marriage that we are at present considering, neither the one nor the other is *ratum et consummatum*. The one, the marriage *consummatum et ratum*, became *ratum* by the baptism of the two parties, but, having thus become *ratum*, it is assumed that it has not as yet been consummated since the baptism took place. The other, the marriage *legitimum consummatum*, does not pass from the category of simply legitimate marriages by the baptism of one only of the parties. The baptism of both is necessary for that.

THIRD POINT. DISSOLUTION OF THE CONJUGAL BOND BY RELIGIOUS PROFESSION.

PROPOSITION. *Solemn profession, in virtue of the ecclesiastical law, dissolves marriage ratum non consummatum (as well as marriage legitimum non consummatum); but it is a disputed point if it has the same efficacy with respect to marriage legitimum consummatum and marriage consummatum that subsequently becomes ratum.*

1. Consult the first case proposed to the C. S. O. and solved 30 April 1908, to be found in the *Coll. Brug.*, t. XIV, p. 241 s.

2. « Sane quod Dominus in Evangelio dicit, non licere viro... uxorem dimittere, intelligendum est, secundum interpretationem sacri eloqui, de his quorum *matrimonium carnali copula est consummatum* ». In the whole chapter it is a question of the marriage of *Christians*.

Explanation and demonstration.

189.
Marriage
ratum non
consumma-
tum is dis-
solved

I. We will take first marriage RATUM NON CONSUMMATUM.

1. Marriage *ratum non consummatum* is dissolved by solemn religious profession, and, *a fortiori*, marriage *legitimum non consummatum*, since this establishes a still weaker bond of union. It does not greatly matter whether the party, who thus enters religion, lawfully left the conjugal abode under the privilege accorded to the newly married during the first two months of the marriage, or whether that party left unlawfully, after the expiration of the privileged period.

On the other hand, marriage *ratum* is no longer dissoluble when once it has been consummated, no matter *how* the consummation may have taken place, even if the husband has employed violence towards his wife during the privileged two months of which we have just spoken. Without doubt in such a case the wife has the option of entering religion, even against the will of her husband, and of taking solemn vows therein; but that does not dissolve the marriage, and the husband thus left to himself cannot contract a new marriage ⁽¹⁾.

by solemn
profession,

2. Solemn profession alone possesses this efficacy. Consequently neither a vow to enter Religion, nor the actual entering of it, nor the profession of *simple* vows, nor the reception of Sacred Orders suffices for the purpose; *only solemn* profession, in a *regular Order strictly so called*, can bring about this result ⁽²⁾.

This efficacy of solemn vows is legally sanctioned in the Decretals by Alexander III, c. 2 ⁽³⁾ and 7, X, III, 32, and by Innocent III, c. 14, *ibid.*; it is taught, and confirmed by

1. Cf. WERNZ, o. c., p. 1029 s.; FAHRNER, o. c., p. 303-304; ROSSET, o. c., I, nos 684-692; SCHMALZGRUEBER, on I. III, Decr., in tit. 32. nos 11-14.

2. For the distinction between simple and solemn vows, see VERMEERSCH, *De Religiosis Institutis et Personis*, II, 3rd ed., Bruges, 1904, p. 12 s.; DE BRABANDERE-VAN COILLIE, o. c., I, n 565 and the authors quoted there.

3. « Verum post consensum legitimum de praesenti, licitum est alteri, altero etiam repugnante, eligere monasterium, sicut etiam sancti quidam de nuptiis vocati fuerunt, dummodo carnalis commixtio non intervenerit inter eos, et alteri remanenti, si commonitus continentiam servare noluerit, licitum est *ad secunda vota transire*, quia, cum non fuissent una caro simul effecti, satis potest unus ad Deum transire et alter in saeculo remanere ».

anathema in Sess. XXIV, can. 6, of the Council of Trent (¹).

There are several other ecclesiastical documents to the same effect, especially the declaration of Pius IX, of 25 Jan. 1861, decreeing : « that marriage *ratum et non consummatum* is dissolved only by solemn profession, and not by simple religious vows » (²). Benedict XIV, *De Synodo dioec.*, XIII, c. 12, n° 9, holds the same doctrine (³). to the exclusion of a simple vow,

Hence it follows that the simple vows taken *in the Society of Jesus* after two years' noviciate, do not in any way dissolve a marriage *ratum*. Certain authors formerly maintained the contrary, invoking the Constitution of Gregory XIII, of the 25 May 1584, *Ascendente Domino* ; but this Pontifical document, if it gives to the above mentioned vows the force of a *diriment impediment* in relation to *future marriage*, does not in any way attribute to them the power of *dissolving a marriage already contracted* (⁴). The

1. « Si quis dixerit matrimonium ratum non consummatum, per solemnem religionis professionem alterius conjugum non dirimi, anathema sit ». FAHRNER, O. C., p. 295-296, shows how the Protestants gave the Council occasion to pass this decree.

2. FAHRNER, O. C., p. 195, on this point wrongly invokes the confirmatory evidence of Boniface VIII, cap. unic., tit. 15, III, in the VI Decr., who decrees that only a solemn vow, to the exclusion of a simple vow, is capable of « annulling marriage subsequently *contracted (post contractum)* ». For, the whole context, no less than its comparison with the cap. unic., tit. VI, *Extrav.*, of John XXII, shows that the Pope is speaking of marriage *posterior, not anterior* to the vow. Moreover, if Boniface had in view marriage *anteriorly contracted*, his declaration would also include the vow taken in the reception of Orders ; but this cannot be upheld, as we shall show later, in nos 284 and 285.

3. « Animadvertendum tamen est privilegium hoc esse concessum tantummodo religiosae professioni, emissae in aliqua ex approbatis Religionibus, in quibus, nimirum emissa castitatis, paupertatis et obedientiae vota, solemnium vim et naturam obtinent ; nunquam vero professioni emitti solitae in quibusdam piarum mulierum coetibus..., quarum vota, non inter solemnia, sed inter simplicia recensentur, juxta constantem atque conformem sententiam tribunalium tum Rotae, tum Congregationis Concilii.

Benedict XIV also adds, in the same passage, that it is a question of solemn vows, including the vow of *perfect* chastity, so that marriage *ratum* is not dissolved even by solemn profession in the military orders, « in quibus non indefinita sed plerumque conjugal castitas, vel a secundis nuptiis abstinentia fovetur ». Cf. also FEYE, *De Imp.*, n° 515.

4. See below, n° 284 ; FAHRNER, O. C., p. 308-310 ; WERNZ, O. C., IV, p. 1030, n° 698 ; FEYE, *De Imp.*, n° 516 ; GASPARRI, O. C., n° 5746-1082.

vows taken by religious women in Belgium and France have no greater efficacy, seeing that they are not admitted as solemn vows.

and of
Orders ;

To be more precise, neither the taking of *Orders*, nor the vow of chastity involved therein, suffices to dissolve such a marriage, though they constitute a diriment impediment to all subsequent marriage. This is clearly taught by John XXII, *Extrav.*, cap. unic., tit. VI : « Desiring to put an end to an old controversy,... we declare by this present decree that the *vow solemnized by the taking of sacred Orders* must be held to take effect, according to the canonical laws, as a diriment impediment of marriage to be contracted or contracted after its emission ; but with regard to the dissolution of marriage previously contracted, even of marriage not consummated as yet by the copula, it must be held as of no effect, for neither in the divine law, nor in the sacred canons do we find that established ». See below, n° 285.

In conclusion, let us observe that marriage is dissolved by a solemn vow only *at the moment the profession takes place* ; whence it follows that the partner remaining in the world cannot marry again before that event ⁽¹⁾. Now, the canonical law of the 19 March 1857, issued by the S. C. super Statu Regularium, prescribes a full year's novitiate before the taking of the simple vows, and then an interval of three years before the solemn profession ⁽²⁾. Nevertheless, Pius IX, in his declaration of 1861, adds that the postulant, whether husband or wife, may have recourse « to the Holy See to obtain permission to take the solemn vows without delay ». Cf. FEYER, *De Imp.*, n° 519.

by the merely
ecclesiastical
law.

3. The whole of this question is a matter of **ecclesiastical law**. The Church here exercises its power, not in its own name, as when it promulgates purely ecclesiastical laws, but in the name of God, as being the minister and instrument of God, as we have

1. The partner remaining in the world is free from the day of the profession of the other partner. For the legal proof of free state, a certificate of the profession made by the husband or wife should be given to the said partner, and the dissolution of the marriage should be entered in the register of marriages, in the margin of the entry attesting the celebration of the marriage.

2. The special rule of the Society of Jesus does not admit all the religious of the Order to solemn vows ; and for those admitted, it requires that a prolonged period should elapse between the simple and solemn vows.

explained above in n° 172 (1). Many authors are in error on this point, and deduce from the natural law or from the immediate divine law (2) the efficacy of solemn profession in relation to marriage.

There can be no doubt on this point: for, on their theory, it is impossible to explain the fact that only solemn vows possess the privilege of dissolving marriage, to the exclusion of the simple vows. Simple profession does not safeguard the religious life less than solemn profession (3); and this solemnity itself comes only from the purely ecclesiastical law (4).

Our view is still further confirmed by the *historical phases* of the development of the exercise of the papal dispensing power in this matter (see above, n° 187). History attests that the vow has been admitted as a cause of divorce by *the ecclesiastical authority itself, and by way of a general dispensation* for all cases of marriage *ratum*. The Church, therefore, held, as we have observed, that the indissolubility of such marriages was subject to its jurisdiction; and it judged practically that, within certain limits and for a legitimate cause, it had power to break the bond by a dispensation, and that, either in a particular case or by a general measure; in this sense, that it had the power to determine the circumstances that should be sufficient in law for the dissolution of the marriage.

We can thus understand how Innocent III, cap. 14, X, III, 32 (Friedberg ed.), seems to have tried to abrogate the vow as a cause of dissolution, as he did in fact remove from the number

1. As we said then, this power is not *purely* ecclesiastical, and in a certain aspect it may be called divine. It is thus that BILLOT, o. c., II, p. 411, says that marriage, in the case in question, is dissolved by *the mediate divine law consequent on the exercise of the power of the Keys*.

2. The various opinions of authors may be found in FAHRNER, o. c., p. 296-301; and WERNZ, o. c., n° 698, notes 47-49.

3. Thus, simply professed Jesuits are indubitably true religious, no less than all the members of other Orders, when once they have taken their simple vows; and the authoritative judgment of the Church is our warrant for this, for Leo XIII declares that it is so, in his Constitution *Conditae* of the 8 Dec. 1900, concerning Orders with simple vows.

4. Cf. Boniface VIII, cap. un., tit. 15, III, in VI°: « Considering, therefore, that the solemnity of vows was introduced by *the sole provision of the Church...* ».

of admitted causes the affinity subsequent to marriage, accepted by Alexander III.

The refutation of the arguments put forward by the supporters of the contrary opinion (among others by PALMIERI, o. c., p. 206) may be found in FAHRNER, l. c. ; WERNZ, o. c., IV, n° 698 and BILLOT, o. c., p. 410 s. This last named author gives a complete refutation of the objection drawn from the fact that the dissolution of the marriage bond by religious profession is the object of a dogmatic definition by the Council of Trent. This objection, which, at first sight, appears plausible, is answered by a distinction (¹).

190.
There is a
doubt as to
marriage
legitimum
consumma-
tum, and con-
summatum
ratum.

II. We now come to marriage LEGITIMUM CONSUMMATUM, rendered subject to the Church by the baptism of one of the parties ; and also to marriage CONSUMMATUM BECOME RATUM by the baptism of the two parties. This is a more difficult question.

Can we apply and extend to such marriages the privilege enjoyed by religious profession through the Church's positive concession ? Certainly we cannot do so unless there is a foundation for it in some positive legal provision. Now, no certain example of a dissolution of this kind is known to exist ; and as to the legal texts that recognise in solemn vows the power of dissolving a marriage *ratum*, they ought to be understood, as WERNZ says (²),

1. The object of the infallibility of the Church is *twofold* : the *principal* object, comprising the truths contained in the deposit of revelation, whether explicitly, or implicitly but in a formal manner ; and the *secondary* object, embracing truths that have not been revealed, but which must necessarily be taught in order to keep entire the deposit of revelation. Accordingly, it may happen that a truth has not been revealed by God, but, nevertheless, rests on the infallible teaching of the Church, and is therefore matter demanding the assent of *ecclesiastical faith*. It is thus that the dissolution of marriage by religious profession may result from the ecclesiastical law and at the same time be the object of a dogmatic definition. It is of no importance that the discipline is capable of change in this respect, and that the Church might subsequently deny to religious profession the efficacy that it at present possesses. For, if « the discipline were at any time changed, the object of the infallible definition would no longer exist ; but the infallibility would remain intact ; it would always remain true that the taking of vows, of which the Council speaks, annulled marriage ». BILLOT, l. c.

2. O. c., IV, n° 699, where the different authors favouring the two opinions are given. Cf. n° 702, note 72.

of marriages « called *ratum in ordinary language*, and not of that altogether *exceptional* class of marriages *ratum* that have been consummated before baptism. The extension of the papal privilege to such marriages would be arbitrary and exaggerated » (1). However that may be, it would be unlawful in this case to act upon an opinion favouring dissolution, without first consulting the Holy See.

On the other hand, if we have grounds for acknowledging that the Pope has power to dissolve marriages of this kind, there seems to be no reason for denying that *he is able* to admit also solemn profession as a cause of such dissolution. This would be simply a way of dispensing by a general measure, analogous to that which the Church has introduced in the case of marriage *ratum* properly so called.

Note. Has the Church power to decree the dissolution of marriage *ratum non consummatum* for a *general cause* other than solemn profession? Our answer is that the Church could do so, provided that there were a sufficient reason of expediency or necessity. The power of the Pope, such as we have described it above, and as it appears in the historical phases of its exercise, is very wide with regard to the marriage in question. Such marriage is subject to the jurisdiction of the Church, and is accordingly capable of dispensation, where a legitimate reason exists, either *in particular cases*, or *by a general law*. Therefore, just as the Church has established the vow as a legal cause of dissolution, so also could it, in certain circumstances, introduce other general causes of divorce, as, indeed Alexander III did in the matter of affinity supervening after marriage.

Could the Church introduce other causes of dissolution?

FOURTH POINT. THE DISSOLUTION OF THE CONJUGAL BOND IN THE CASUS APOSTOLI.

PROPOSITION. *In virtue of the Pauline privilege, marriage validly contracted between unbaptized persons is dissolved, when one of the partners, after having received baptism, marries again, provided that the other, having been duly admonished, withdraws, i. e., perseveres in his religion and refuses to cohabit peacefully with the converted partner.*

1. We have already shown above, that marriage *consummatum ratum*, if it is not to be put in the same rank with marriage *ratum consummatum*, cannot, nevertheless, be called simply *ratum non consummatum*.

Explanation and proof.

I. SCRIPTURAL FOUNDATION OF THE PRIVILEGE.

191.
The Pauline
Privilege is
based on
I Cor.

The « *Casus Apostoli* » is given in *1^a Cor.*, VII, 8-15, more especially in verses 12-15. The passage is as follows : « 8. But I say to the unmarried, and to widows, it is good for them if they so continue, even as I. 9. But if they do not contain themselves, let them marry ; for it is better to marry than to be burnt. 10. But to them that are married, not I, but the Lord commandeth, that the wife depart not from her husband ; 11. and if she depart, that she remain unmarried, or be reconciled with her husband. And let not the husband put away his wife. 12. *For the rest I speak, not the Lord* ⁽¹⁾ : *if any brother have a wife that believeth not, and she consent to dwell with him, let him not put her away.* 13. *And if any woman have a husband that believeth not, and he consent to dwell with her, let her not put away her husband.* 14. For the unbelieving husband is sanctified by the believing wife ; and the unbelieving wife is sanctified by the believing husband ; otherwise your children should be unclean ; but now they are holy. 15. *But if the unbeliever depart, let him depart ; for a brother or sister is not under servitude in such cases ; but God hath called us in peace* ».

The essential point in the doctrine of St. Paul is contained in verse 15 : « *If the unbeliever depart, let him depart* ». For, these words show that the case involves the dissolution of the conjugal bond, under certain conditions, among which the separation effected by the unbaptized partner holds the principal place.

This is very well explained by PALMIERI, o. c., p. 217. « For », he says, « the sense of the passage is this : if the unbaptized party effects the separation and puts away the baptized partner, or, in other words, as it is said above in the text, if the infidel party does not consent to live with the baptized one, the former is to be forsaken and allowed to depart. The

1. According to certain authors, these words are not a form of introduction, but refer to what goes before, and are the counterpart of the corresponding form in verse 10. Instead of introducing the following clause, it would on the contrary be the conclusion of verses 8-11 and the sense would be as follows : On those that are married the Lord imposes this commandment, and not I ; but to the others, i. e., the unmarried, spoken of in verses 8 and 9, I say, and not the Lord. This interpretation is upheld, among others, by PALMIERI, o. c., p. 216.

Nevertheless, the majority of authorities are of the contrary opinion, and refer the form to the following verses. In their opinion, St. Paul here addresses himself to *heathen* husbands and wives, in opposition to Christian, of whom he speaks in verses 10 and 11.

nature of this abandonment is explained in the reason added by the Apostle, viz., that in such cases, as concerns the conjugal bond, a brother or sister is not under servitude, namely, to the unbaptized party. Now this reason shows that the infidel party may be left *in such a way that the conjugal bond itself is also broken*; for otherwise the baptized party would still be in servitude to the other. The convert would remain bound by the marriage, without the power of making use of it, owing to the malice of the other. Either freedom from slavery merely means that the deserted party is not bound to follow and seek reconciliation with one who goes away without cause, or it means that the deserted party is freed from the conjugal bond. But the former alternative is equally applicable to all kinds of unjustifiable desertion, whether on the part of Christian or non-Christian parties, and in such a case there is no obligation for the deserted party to seek reconciliation, even when both remain infidels; but the Apostle is here speaking in particular of desertion on the part of the infidel, and of a prerogative that Christians possess; therefore the second alternative must be the one that is meant ⁽¹⁾.

This quotation shows us at once the *object* and *reason* of the innovation introduced by St. Paul. This was *the advantage of the faith*. It was necessary to make things favourable for conversion to the faith; but married infidels would be deterred therefrom if they knew that they were bound after baptism to observe continence, in case they were not able to live peaceably with an unconverted husband or wife.

Some authors maintain that the dispensation, of which we have just been speaking, is *of divine law*, promulgated by St. Paul; while others prefer to speak of it as of *apostolic right*, introduced by the Apostle of the Gentiles, in virtue of special authority, and afterwards extended to the whole world with the consent of St. Peter. The introductory clause, « I speak, not the Lord », as referring to what follows, certainly seems to favour the latter opinion; more-

1. Cf. WERNZ, o.c., IV, n° 702, note 61. Cf. also FAHRNER, o.c., p. 146-169 and 271-290, who there gives at length the successive interpretations that have been put on the text of St. Paul, together with the historic phases of the doctrine of dissolubility in the *Casus Apostoli*. Let us note on this subject the singular opinion formerly put forth by certain theologians: according to them the conjugal bond was dissolved by the very fact of the separation effected by the infidel party, and they held that, if this party subsequently became converted, the same bond in some way resumed its force « *quasi jure postliminii* », as they said, so that the former marriage ought to be re-established, inasmuch as the former marriage was now in favour of the faith (*ex consequentia prioris matrimonii in favorem fidei*) p. 168.

over, we shall show below, n° 196, and as we have already seen in n° 188, that the Sovereign Pontiff has power to dissolve marriage *legitimum consummatum*, even when the conditions required by St. Paul are wanting : if, therefore, the Church has, of itself, more than sufficient power, there is no apparent reason for the intervention of divine authority in the case of the Apostle (1). Nevertheless, the former opinion has the support of the *Instruction* of the C. S. O., 11 July 1866, ad 8^m, where the privilege is called divine, granted for the advantage of the faith « by Our Lord, and promulgated by the Apostle, St. Paul » (2)

II. OBJECT OF THE PRIVILEGE.

192.

*It affects
marriage
contracted*

A. The *Casus Apostoli* affects only marriage *legitimum*, that is to say, marriage *validly contracted between unbaptized persons*, whether consummated or not. Consequently :

*between un-
baptized
persons,*

1. It cannot be applied to a marriage contracted between a *baptized* and an *unbaptized* person under a dispensation from the impediment of *disparitas cultus*. Once such a marriage has been consummated, it cannot be dissolved, and only separation is possible (3), according to the rules given above. The *Casus Apostoli* in no way affects marriage contracted between *two baptized persons*, one of whom, through hatred of the Christian religion, has embraced paganism (4).

validly ;

2. We must also exclude marriage contracted between unbaptized persons, but *invalidly*, as is often the case.

To judge of the validity or invalidity of such marriages, we must first of all see if the usual ceremonies have been observed, according to the customs of each country (5) ; and we must then

1. Cf. *Schweiz. Kirchenzeitung*, 1911, p. 36 ; VERMEERSCH, *De Casu Apostoli* n° 2.

2. *Collectanea*, n° 1353, cf. nos 1354 and 1323. Cf. WERNZ, o. c., IV, n° 702, note 60.

3. Decree of the C. S. O., 15 Aug. 1759, in the *Collectan.*, n° 1312.

4. This has been repeatedly declared by the Holy See, as may be seen from the decrees given in the *Collectan.*, n° 1280 ss. Innocent III, cap. 7, X, IV, 19, pointed it out quite clearly, and laid stress on the difference between the two cases, adding, however, that one of his predecessors had decided otherwise. And, in fact, there exists a decision in the contrary sense emanating from Celestine III, and given in FRIEDBERG, *Corpus Juris Canonici*, cap. 1, X, III, 33, according to cap. 2, *Comp.* II, III, 20. Cf. FAHRNER, o. c., p. 161 s., and below, n° 200.

5. Thus the C. S. O., in its decree of 7 Aug. 1898, declares that we must consider as valid marriages celebrated « with the usual ceremonies of the country,

find out if there were any diriment impediments of the natural, divine, or civil law (¹).

If the validity remains *doubtful*, the doubt must be solved *in favour of the faith*, i. e., so as to leave the converted partner at liberty (²); but it must not be assumed that there is a

sufficiently expressing the mutual and present consent of the parties, according to the common estimation of the locality ». Cf. *Collat. Brug.*, t. IV, p. 542 ss., and SICA, o. c., p. p. 337 ss.

1. Special attention ought to be given to the question, whether the consent was given under a suspensive condition, incompatible with the substance of marriage, keeping in view the various decrees of the Holy See on this matter, among others the *Instr.* of the C. S. O., of 9 Dec. 1874, nos 8-10, and of 24 Jan. 1877, in the *Collectan.* nos 1301 and 1302, compared with the decree of the same Congr. dated 18 May 1898, in the *N. R. Th.*, t. XXX, p. 27. Consult also the article by PLANCHARD, in the *R. Th. Fr.*, 1899, p. 93-99, and P. MICHEL, o. c., p. 11 ss., compared with the solution given by the C. S. O., on 30 Apr. 1908, to the first case. (See the *Coll. Brug.*, t. XIV, p. 241 ss.).

It also happens that infidels « occasionally marry without the customary local ceremonies, so that in the beginning these unions must be regarded as concubinal. But things turn out well and they live together faithfully... leading a conjugal life which they will not give up, because they love one another, have children, and separation would cause them both serious injury ». (*Collectan.*, no 1356, towards the end, and no 1301, 17). Marriages of this kind become legitimate in the course of their existence, and this is why the Cardinals declare « that it is necessary to examine not only the initial circumstances, and the way in which the marriage was first contracted, but also its duration and the other circumstances that may have subsequently intervened, such as the birth of children, mutual love, its continuance and growth, and so forth. If such indications either singly, or by their collective weight, show certainly or almost certainly that the parties in question will remain united until death, though it may be evident that in the beginning there was only an irregular union, it must, nevertheless, be held as certain, or at least as probable, that such illicit union has, in the course of time, passed into a legitimate marriage ». *Collectan.*, no 1301 ad 17, and compare with the decree of the C. S. O. 1892 (*ibid.*, no 2184); cf. also VERMEERSCH, *De Casu Apostoli*, ch. II, art. 1, par. 1, especially nos 13 and following; *La Revue Congolaise*, II, p. 170 ss.

2. See the decrees of the C. S. O., of 8 June 1836 (*Collectanea*, no 1332), and the decrees of the C. S. O. of 18 May 1892, in the *Collectanea*, nos 2184 and 2185, ad 1^m and 2^m respectively, and compare with the decree of the C. S. O. of 7 July 1880, given by WERNZ, o. c., IV, no 702, note 66. Cf. also *Coll. Brug.*, t. IV, p. 550 s. and the documents quoted there, as well as the decree of the C. S. O., of 19 Apr. 1899, in the *Anal. eccl.*, 1899, p. 236 and 283.

An example may be found in the case of a marriage contracted within the

193.
it implies the
dissolution of
the conjugal
bond

doubt without previous examination and careful inquiry (1).

B. The Pauline privilege implies the dissolution of the conjugal bond. Nevertheless, it is to be observed that marriage *legitimum* is not dissolved by the fact of the baptism of the converted partner (2), even if the other withdraws; it becomes dissoluble only at the will of the former. It is not really dissolved until the convert, making use of his right, *actually marries again* (3).

degrees of consanguinity within which marriage is probably invalid by the law of nature itself, as for instance, between brother and sister (cf. *infra*, n° 300). On the conversion of one of the parties, the marriage might be declared null, with liberty for the baptized party to marry again, quite apart from any application of the Pauline privilege. We say « *might be* », because it cannot be said that nullity *must* be declared, and it would even be lawful to continue cohabitation, apart from scandal (as in the case mentioned), or danger to the faith of the baptized party.

1. The preliminary inquiry must not be omitted even in the case of *savage* tribes, that have apparently lost all idea of true marriage, like the tribes spoken of by the Bishop of St. Albert, in the doubt proposed by him to the C. S. O. The S. Congr., on the 9 Dec. 1874, made the following observation: « it is neither certain nor proved that among such tribes there is no marriage valid in the natural law, that all their unions are indiscriminately concubinal, and that every idea, however indistinct, of the difference between marriage and concubinage has been lost to them. It is not right to pass a judgment like that on an entire foreign race, without having first made a careful examination of their manners and customs, and basing such a conclusion on weighty arguments drawn from ascertained facts: without that, we must keep to the *presumptio juris*. For, in the absence of certain proof, nature which, as the Apostle says, Rom. II, 14, has implanted the first conception of marriage in the hearts of all, cries out on behalf of these tribes, however abandoned they may be ». (*Collectanea*, n° 1301, ad 2^m).

* All things considered, it is, therefore, impossible to establish a general rule permitting the omission of particular inquiry, and to decree that the marriages of infidels in this (barbarous) country, and of such Catholics as happen to be in like ignorance, are to be considered as mere concubinage; on the contrary, a special inquiry must be made into each particular case ». *Ibid.*, n. II. Cf. also the decree of the C. S. O. of 18 May 1892, in the *Collectanea*, n° 2184.

2. « Cum per sacramentum Baptismi non solvantur conjugia, sed crimina dimittantur ». C. 8, X, IV, 19.

3. « Hoc privilegium divinum in eo consistere, quod stante matrimonio legitime in infidelitate contracto et consummato, si conjugum alter christianam fidem amplectitur, renuente altero in sua infidelitate obdurato cohabitare cum converso, aut cohabitare quidem volente sed non sine contumelia Creatoris... tunc integrum fit conjugii converso transire ad alia vota, postquam infidelis

It is, therefore, the new marriage of the baptized partner that dissolves the bond of the previous marriage, and this dissolution at the same time entails the validity of the second alliance, just as in the transformations of nature the corruption of one substance gives birth to another. The former union being thus dissolved, the party remaining unbaptized, is also at liberty to marry again (¹).

III. CONDITIONS.

The first condition is that **one of the parties be converted**, and receive baptism. The necessity of this condition follows from the words of St. Paul, and from the end for which the privilege was introduced. It does not matter if baptism be received in a heretical sect (²), but the fact that the one party has become a catechumen does not suffice (³).

The second condition is that **the other party effect the separation**. This condition is considered to have been fulfilled when the two following points have been verified :

A. *Perseverance in infidelity*. For, if before the converted party marries again, the other also is converted and receives baptism, the Pauline privilege does not apply, and the original marri-

194.
Conditions :
1^o one of the
parties must
receive
baptism ;

2^o and the
other effect the
separation,

i. e., that,
remaining in
infidelity,

interpellatus, aut absolute recusaverit cum eo habitare, aut animum sibi esse ostenderit cum illo quidem cohabitandi, sed non sine Creatoris contumelia. Juxta idem divinum privilegium, conjugem conversum ad fidem, in ipso conversionis puncto non intelligi solutum a vinculo matrimonii cum infideli adhuc superstite contracti, sed tunc, si conjux infidelis renuat, acquirere jus transeundi ad alias nuptias cum tamen conjuge fideli. Caeterum tunc solum conjugii vinculum dissolvi quando conjux conversus *transit cum effectu ad alias nuptias* ». *Instr. C. S. O.* 11 Jul. 1866, in *Collectan.* n^o 1353.

1. « Principium autem juris communis est : soluta a vinculo conjugali muliere, solum remanere et virum ; quippe vinculum est inter duo, seu duorum in unum, idcirco libertas unius libertatem infert alterius ». *Instr. C. S. O.*, 16 Sept. 1824, in *Collectan.*, n^o 1328, ad 1^m.

2. Cf. PALMIERI, o. c., p. 234 s. ; WERNZ, o. c., IV, n^o 702, note 59.

3. Decree of the S. C. de P. F., 16 Jan. 1803, *Collectan.*, n^o 1379. As regards a married catechumen who desires to take advantage of the Pauline privilege, observe that such cannot be admitted to baptism, unless disposed to keep or take back his legitimate partner, where the latter consents to peaceable cohabitation. Decision of the C. S. O., of 13 Apr. 1908, in the *Coll. Brug.*, t. XIV, p. 241 ss. See also VERMEERSCH, o. c., n^o 37 ss. ; the Author observes that one may sometimes respect the good faith of the aspirant to baptism.

age, now become *ratum* by the baptism of both parties, is henceforth subject to the laws of Christian marriage. The words of St. Paul, and the decrees of the Holy See leave no doubt on this point (1). On the other hand, however, it suffices for the converted partner, if, at the moment of using the privilege, the other is still in fact an infidel, even though the latter has shown a disposition to embrace the faith, or has already become a catechumen (2); but the fulfilment of the second condition, of which we shall speak immediately, is supposed (3).

he refuses
peaceable
cohabitation ;

B. *Refusal of peaceable cohabitation* on the part of the unconverted party. This case occurs in three hypotheses :

1. If he is unwilling to *continue cohabitation*, i.e., community of bed and board, though, perhaps, himself inclined to Christianity (4). It does not matter what the reason of his refusal may be,

1. See *inter alia* the decrees of the C. S. O., of 11 June 1866, ad 8^m, of 20 June 1866 and 18 May 1892, ad 2^m, in the *Collectan.*, nos 1353, 1354 and 2185 ; likewise cap. 8, X, IV, 19, where Innocent III declares : « If the husband is converted, and his wife, acting in like manner, follows him before he has lawfully married again..., he will be under the obligation of taking her back ». See also VERMEERSCH, o. c., n° 37 ss., where he observes that there is sometimes occasion to take into account the good faith of the unbaptized.

2. Decree of the C. S. O., of 8 July 1891, *Collectan.*, n° 1362, and of 28 Apr. 1899 ; *Anal. eccl.*, 1899, p. 283, compared with P. MICHEL, o. c., p. 35 ; see also the 2nd and 3rd cases solved by the C. S. O. on 30 Apr. 1908, l. c.

3. Certainly, if on other grounds there is no reason to fear for peaceable cohabitation, it is not lawful to marry again when the requisite departure is wanting ; and if the unbaptized party, being willing to cohabit peaceably, puts off the conversion to which he shows himself inclined, the execution of his good intention must be awaited with patience. On the other hand, however, an excessive delay in receiving Baptism may well give rise to doubts of his sincerity, and even cause suspicion that the faith of the convert is in danger. On this account the Holy See requires that the Bishop should be consulted, and he, after considering all the circumstances, will decide if it is a case for the Pauline privilege. Cf. decreta C. S. O., 4 July 1855 and 29 Nov. 1882, in the *Collectan.* 2, n. 1113 and 1581 (ad 3^m) ; cf. also *l'Ami du Clergé*, 1912, p. 238 s.

4. To the question : « If a convert was married, before his conversion, to an infidel wife, who also wishes to embrace the faith, but absolutely refuses to live with him... can he make use of the Pauline privilege, and marry again, after having ascertained the intentions of his wife as to cohabitation ? », the C. S. O., 8 July 1891, replied « in the affirmative... provided the wife is still in infidelity ». *Collectanea*, n° 1362, and compare with the decree of 26 Apr. 1899, in the *Anal. eccl.*, 1899, p. 283.

whether hatred of religion, or any other motive whatever, provided it is not the baptized partner *who has given him a just and reasonable cause for separating from her* ⁽¹⁾; a motive based on something that occurred *before baptism* is not considered a legitimate reason ⁽²⁾.

2. Or, again, if he consents to cohabitation, but *will not live with her peaceably and without blaspheming the Creator*; e. g., if he endeavours to lead the baptized party away from the faith ⁽³⁾, or to draw her into mortal sin, especially against conjugal chastity ⁽⁴⁾, or if he refuses to give up the practice of concubi-

1. To the question: « An (privilegium fidei) solum locum habeat quando infidelis discedit odio fidei, an etiam quando discedit propter discordias vel aliam causam a fide diversam ? », the C. S. O., 5 Aug. 1759, replied: « Cum militet ex parte conjugis conversi favor fidei, eo potest uti quacunq[ue] ex causa, dummodo justa sit, nimirum *si non dederit justum ac rationabile motivum alteri conjugi discedendi* ». *Collectan.*, n° 1312, ad 2^m; and cf. decr. C. S. O., 26 Apr. 1899, in the *Anal. Eccl.*, 1899, p. 283.

2. Thus a fault, e. g., adultery, committed by the convert *before conversion*, is not considered just and reasonable ground for separation, « because the stain of adultery committed before baptism is looked upon as washed away by baptism ». Consequently, when it is a question « of an infidel invited to resume conjugal relations with his converted spouse, and he refuses to do so solely on the ground that he had already repudiated her on account of adultery committed before conversion, the refusal of the infidel party renders the other free to contract a fresh marriage ». Such is the decision of the S. C. de P. F. 30 Jan. 1807 (*Collectan.*, n° 1332).

On the other hand, adultery *subsequent* to conversion furnishes the infidel party with a legitimate motive for separation, and « in that case such separation does not in any way render the convert capable of marrying again ». *Ibid.*, and cf. the decree of the S. C. de P. F., 16 Jan. 1797, *Collectan.*, n° 1318. Finally, to the question: « are faults committed after baptism, but of no consequence in the eyes of the infidel party, or entirely unknown by him, an obstacle to the use of the Pauline privilege by the baptized party ? », the C. S. O., on 19 Apr. 1899, replied by referring to its decrees of 6 Aug. 1759 and of 16 Jan. 1797, mentioned above in this and the preceding note, and by calling to mind the principle which we shall meet with later, viz., that in doubt the decision must always be to the advantage of the faith. *Anal. eccl.*, 1899, p. 236. Cf. VICTORIUS AB APPELTERN, O. C., p. 207 s., and SICA, p. 401 ss., and 456 s.

3. Decr. of the C. S. O., 29 Nov. 1882, *Collectan.*, n° 1358, ad 3^m.

4. Decr. of the S. C. de P. F., 5 March 1816, ad 6^m, where we read: « If the solicitation to sin is not on the part of the husband towards his wife (and vice versa), but comes from others who live with him, e. g., from the father-in-law or the mother-in-law, the converted wife may, if she has no other means

nage⁽¹⁾, or to have the children brought up as Christians⁽²⁾.

3. Or, finally, if the infidel party is ready to consent to everything, but finds *impossible to establish the conjugal life*; provided that the converted party has not, since baptism, done anything to cause such impossibility⁽³⁾.

Note. 1. The Pauline privilege is applicable even where the infidel party has not separated from the other (in the sense stated) until after having lived in peace with the convert for several years after the baptism of the latter⁽⁴⁾.

2. When the infidel party consents to cohabit with the convert *peaceably and without blaspheming God*, and is not, therefore, considered to separate, St. Paul teaches that the baptized party cannot put the other away *in order to contract a fresh marriage*. Innocent III, c. 8, X, IX, 19⁽⁵⁾, in his interpretation of the teaching of the Apostle, comes to this conclusion, and the same has received the more recent confirmation of the Holy See⁽⁶⁾.

We say : *in order to contract a fresh marriage*. For, leaving this

of escaping it, leave that house of perdition; but she cannot break the marriage bond and marry again ». *Collectanea*, n° 1323.

1. C. S. O. 11 July 1886 ad 2^m and 3^m *Collectan.*, n° 1353.

2. *Ibid.*, ad 4^m. Cf. VERMEERSCH, o. c., n°s 45 and 48.

3. When the wife, on being asked if she is willing to be converted or to live peaceably with her converted husband, replies « that she is quite willing to do so, but is prevented by a second husband, or by a creditor who will not let her go », the C. S. O., 12 June 1850, decided that the convert could « lawfully and validly contract a fresh marriage with a Christian woman, provided that he was not the cause of the obstacle that prevented his wife from living with him ». *Collectanea*, n° 1339. Moreover, the decree already quoted of the C. S. O., of 8 July 1891, decides that the man can make use of the privilege when his wife has been taken away from him beyond all hope of recovery, even though she should wish to be converted and live with him; and even when the husband has sold his wife, « provided that he did so *before baptism* ». *Collectan.*, n° 1362. Cf. MICHEL, o. c., p. 56 s.

4. C. S. O. 11 July 1866, in the *Collectan.*, n° 1353, ad 1^m, and cf. n° 1337.

5. « Qui autem secundum ritum suum legitimam repudiavit uxorem,... nunquam, ea vivente, licite poterit aliam, etiam ad fidem Christi conversus, habere, nisi post conversionem ipsius illa renuat cohabitare cum ipso, aut etiamsi consentiat, non tamen absque contumelia Creatoris ».

6. « When the unbaptized party consents to live with the baptized without blaspheming the Creator, the marriage holds good according to St. Paul. Decree of the C. S. O., 14 Dec. 1848, *Collectan.*, n° 1338.

out of the question, the baptized partner is not bound to continue cohabitation with the unbaptized: he has a right to a separation *a mensa et toro*; and such separation is not less legitimate than that between a husband and wife who are both baptized, when one or the other of them has fallen into heresy or infidelity. Moreover, if, in a particular case, considering the special circumstances of place and persons, the conjugal life brings with it the danger of perversion for the baptized partner, notwithstanding the good dispositions of the unbaptized and the promise of peaceable cohabitation, the former may be under the *obligation* of abandoning their common abode (¹).

The third condition requires that **by means of an interpellation** formally made to the infidel party, it shall be established that he separates.

A. *The object of this interpellation* is twofold: to ascertain a/ « if the infidel is willing to be converted; b/ or if he is at least willing to cohabit with the other without blaspheming the Creator » (²).

B. *The time* fixed for making this inquiry is that which follows the baptism of the convert (³); but the Holy See permits, in particular circumstances and as a dispensation, the making of the interpellation before baptism (⁴). When once this interpellation has been duly made, there is no need to repeat it, even if the convert should not marry again for a considerable time (⁵).

C. *The form* of this interpellation is either *legal*, in accordance

195.
3° The separation must be established by interpellation.
Object, time and form of interpellation;

1. Some authors (see VERMEERSCH, o. c., nos 45 and 48) hold that the privilege is also applicable in this case; and there are some who go so far as to consider cohabitation with an infidel partner at all times unlawful; whence they infer that the case of the Apostle is verified as often as the said infidel refuses to be converted; at the very least, it would not be permissible to follow this opinion in practice without having recourse to the Holy See, so that it might declare the dissolubility of the marriage, or even, as we shall point out below, dissolve the marriage bond. Cf. *Collectanea*, n° 2183, and compare with MICHEL, o. c., p. 55, and DE BECKER, *De Matr.*, n° 447.

2. Decr. of the S. C. de P. F., 16 Jan. 1797, *Collectan.*, n° 1318; see also nos 1323 ad 2^m, and 1361.

3. Decr. of the C. S. O., 13 Apr. 1859, *Collectan.*, n° 1350, and compare with nos 1357 and 1358. Cf. also the decree of the C. S. O., 3 Apr. 1908, quoted by us in note to n° 194.

4. Nevertheless, as a catechumen is incapable of receiving a dispensation, « we must here understand that the Church ratifies after baptism the interpellation that it permitted to be made before ». VERMEERSCH, o. c., n° 55.

5. S. C. de P. F., 26 June 1820, *Collectan.*, n° 1326.

with the formalities 'prescribed by the Church and this form must, as a rule, be employed ; or *private*, and this suffices in case of necessity, provided that full proof of the same may be given in the external forum ⁽¹⁾. It is better that the interpellation should be made through the agency of some trustworthy person, rather than by the interested party. Cf. *Monita*, p. 521.

D. As regards the *necessity* of the interpellation :

*its necessity is
such that it
may affect
validity ;*

1. All authorities are agreed that the *licit* use of the Pauline privilege absolutely requires the preliminary interpellation, at least in the private form. Moreover, the Holy See is very strict on this point, even in cases where the aforesaid formality appears to be useless or impossible ⁽²⁾, and even when it is already certain that the answer will be in the negative ⁽³⁾.

Moreover, many Roman documents openly base the necessity of this interpellation *on the divine law* ⁽⁴⁾. According to them, then, the divine law (inasmuch as the Pauline privilege is based on the authority of divine law, about which see above n° 191) *in general* requires it, because it demands, as a condition, separation originating with the unbaptized party, and interpellation is the ordinary means of establishing the fact. But this divine law does not enforce its requirements *in all cases* without exception, e. g., where it is already well known from other sources

1. Cf. DE BECKER, *De Matr.*, p. 448 s. ; MICHEL, O. C., p. 48 s. ; PUTZER, O. C., nos 129 and 132 ; this last author gives the form of interpellation.

2. « The missionaries ought to know that Benedict XIV... declares unsafe in practice the opinion that the legal interpellation may be licitly omitted as often as it is in fact impossible, or foreseen to be useless, if made. He is of opinion... that even in the case in which the infidel party has gone away to a distant country, or to an unknown place, so that the interpellation cannot be made, there is still need of a dispensation from the Sovereign Pontiff, to whom it belongs to declare under what circumstances the divine precept, by which the said interpellation seems to be enjoined, ceases to bind ». *Instr.* C. S. O. 16 Sept. 1824, in the *Collectan.*, n° 1328. The decrees of 13 March 1901, given in the *Anal. eccl.*, 1901, p. 154, refer to the same matter.

3. See the decree of the S. C. de P. F., 5 March 1810, ad 3. It is there decided that « the interpellation must be made in the case in question », i. e., when the converted partner has been publicly repudiated. *Collectan.* n° 1323. See on the other side VERMEERSCH, O. C., n° 53.

4. Cf. the decree of the C. S. O., 16 Sept. 1824, just quoted ; the decree of the C. S. O., 12 June 1850, *Collectan.*, n° 1339, as well as the decree of the S. C. de P. F., 3 March 1816, ad 1^m, *Collectan.*, n° 1323.

what to expect in the matter of separation. In that case it is only a question of the ecclesiastical precept, which enjoins the interpellation in all cases without distinction.

2. The Holy See seems to suggest that even the *validity* of the Pauline privilege is subject to the preliminary interpellation (¹). Whence it follows that where this formality has been omitted (without dispensation), the new marriage cannot, *in practice*, be regarded as valid, even if the unbaptized party has in fact gone away. It would then be necessary to have recourse to the Holy See (²).

3. Nevertheless, the obligation of interpellating the unbaptized partner is not so strict as to be incapable of any *dispensation*. On the contrary, the Holy See *can dispense* from one, and even from both parts of the prescribed interpellation, and in fact frequently does so. *one or both parts of the interpellation may be supplied by a dispensation.*

Thus the Holy See ordinarily grants, or gives a faculty to grant a dispensation as to the second part of the interpellation, in favour of converted *polygamists*. It is then sufficient for them to ask the legitimate wife, being still unbaptized, i. e., the wife first married, if she is willing to become a Christian, without saying anything about peaceable cohabitation. If the answer is in the negative,

1. See the decree of the C.S.O., 17 Jan. 1900. It is there declared that the marriage contracted in infidelity continued to exist in the case proposed : a converted husband had contracted a fresh marriage *without* the preliminary interpellation ; the inquiry had not been instituted until after the marriage, and had proved that the former wife neither wished to embrace the faith, nor even to answer the interpellation. Cf. also the S. C. de P. F., 17 Jan. 1836, in the *Collectanea*, n° 1330.

2. We say, *practically*, because *theoretically* the nullity of such a marriage is open to question. For, the documents referred to do not sanction the *principle* or *thesis* of the invalidity of the second marriage owing to the absence of interpellation, when the separation effected by the infidel party is certain at the moment of the second marriage. But in both cases the *practical* and safer solution looks upon the marriage as null, and requires that it should be validated, as a matter of prudence at least, either by a renewal of consent or by a *sanatio in radice*. Moreover, it is not clear, especially in the former case (decr. of 1900), that the infidel party had actually left his partner *at the moment when the second marriage was contracted*. Cf. WERNZ, o. c., IV, n° 703, note 72 and p. 1032. He also appeals to par. 45 of the Instruction of the S. C. de P. F., 1883.

such converts may then lawfully marry any one of their pseudo-wives, no matter which, provided she has been baptized ⁽¹⁾.

Still greater faculties are granted to certain Ordinaries ⁽²⁾ in distant countries: they have power to dispense from *both parts of the interpellation*, that is to say: « to dispense the converted party from the interpellation of the one remaining in infidelity, provided that every effort has been made, including advertisement in the public press, to discover the whereabouts of the infidel, without success, and the impossibility ⁽³⁾ of giving him notice has been at least summarily and extra-judicially established in this way; or, again, where the party has received notice, if it is proved that he has not made known his intention within the time fixed by the interpellation (generally a month); or yet again, for a limited number of twenty extraordinary cases, when access to the infidel party is possible, but the interpellation cannot be made without evident risk of serious injury either to the converted partner or to other Christians » ⁽⁴⁾.

Moreover, all Bishops and Vicars Apostolic have the delegated power of dispensing from both interpellations *in urgent cases*, whenever it is clearly proved that the infidel partner will neither embrace the faith, nor cohabit with the convert without blaspheming the Creator ⁽⁵⁾.

Total dispensation, therefore, requires and supposes *a reason*, the existence of which must be established at least summarily and extrajudicially. Such is, in ordinary cases (as indicated in the above-mentioned indults), the impossibility or the inutility of the interpellation, or the silence of the infidel partner, after due warning that he must give an answer within the time fixed ⁽⁶⁾; and, in

1. This indult appears in *Formula I*, art. 11: « Dispensandi cum gentibus et infidelibus plures uxores habentibus, ut post conversionem et Baptismum, quam ex illis maluerint, si etiam ipsa fidelis fiat, retinere possint, nisi prima voluerit converti ». Cf. the commentary in PUTZER, o. c., n° 127, and compare with MICHEL, o. c., p. 44, who refers to the decree of the C. S. O., June 1850 (*Collectan.*, n° 1044), in support of the statement that this faculty is also applicable to the case of a woman who has several husbands.

Should it happen that none of the wives of the convert consents to conversion, or is accepted by him, a further interpellation of the first and true wife *as to peaceable cohabitation* would then be necessary. If he experiences a fresh refusal, he can then marry any Christian (Catholic) woman.

2. Certain Ordinaries delegate this faculty to some of their missionaries.

3. A moral impossibility suffices.

4. The text is quoted in DE BECKER, *De Matr.*, p. 455. Cf. also VERMEERSCH, o. c., n° 77 ss.

5. C. S. O. 11 Aug. 1859, *Collectan.*, n° 1351.

6. Such are the reasons required in ordinary cases, according to various

extraordinary cases, an evident and serious danger, either to the converted partner, or to other Christians (¹). Outside these cases, in default of a sufficient, or sufficiently certain reason, recourse must be had to the Holy See, and its timely decision awaited (²).

Observe, moreover, that in conformity with the decree of the S.C. de P.F., of the 26 June 1820, the dispensation requires renewal, if more than a year elapses before the convert takes advantage of it to marry again (³).

Note. 1. There are circumstances in which it is not rightly known whether the conditions of the *Casus Apostoli* are fulfilled or not; *in doubt*, the question must be decided in favour of the faith, i. e., in favour of the liberty of the converted partner (⁴).

2. If the convert, making use of the privilege, contracts a new marriage, he must do so with a *Christian*, or rather with a *Catholic* (Decr. C. S. O., 3 June 1874 and 17 July 1850, in the *Collectanea*, nos 1357 and 1340). The Church can dispense from the impediment of *disparitas cultus* or from that of *mixta religio*, but makes a difficulty about doing so in such cases; and the general faculty that one may have for dispensing in the matter of these impediments, is not applicable in this case (⁵); and rightly so, since the new marriage is permitted *for the advantage of the faith* (⁶).

Corollary. Though with us the number of marriages between unbaptized persons increases from day to day, the whole of this question is of less practical importance here than in *missionary countries*, where it is of frequent application, in the case of the conversion of a married adult, and especially of a *polygamist*.

Roman decisions: C. S. O., 20 June 1866, (*Collectan.*, no 1354), 16 Aug. 1895 (*Anal. eccl.*, 1897, p. 13), and in the double decree of 13 March 1901 (*Anal. eccl.*, 1901, p. 154). The *Collectanea*, no 1331, in the note, and MICHEL, o. c., p. 61-66, show the scope of these utterances.

1. C. S. O., 29 Nov. 1882, in *Collectanea*, no 1338, p. 481.

2. See the decrees by which the Holy See gave a dispensation in the case of insanity, and in that of an infidel party who gave a promise of peaceable cohabitation, but whose word could not be relied on. Cf. decrees of the C. S. O., 9 Dec. 1904 and 23 Nov. 1894, in the *Anal. eccl.*, 1904, p. 191 and 1897, p. 12 s.

3. *Collectanea*, no 1326. It is different if there has been interpellation and not dispensation: in that case there is no need to renew the former, even if the fresh marriage has been delayed for more than a year. See above, and SICA, o. c., p. 414 s.

4. C. S. O., 9 Apr. 1899. *Anal. eccl.*, 1899, p. 236.

5. *Collectanea*, no 1356; SICA, o. c., p. 415 s.

6. Cf. MICHEL, o. c., p. 36 s.

When a polygamist asks for Baptism, it is first necessary, as we have said above, to inquire into the nature of the marriage already contracted by him. *If it is clearly proved* that he is already validly married, after his baptism, his first wife, as being the only lawful one, must be interpellated; but if a dispensation has been duly given, it is sufficient to question her as to her intention of receiving baptism. If she refuses to become a convert, the husband may then take at will any one of his pseudo-wives, provided she has been baptized (1).

If however, the matter is *in doubt*, and it cannot be known for certain if the convert's first marriage was valid, or which was his first wife, then, for the advantage of the faith, he is at liberty to take which he prefers.

Scholion.

196.
The proceeding of the Church proves that it has the power to dissolve the marriage of the infidels.

We have seen that the Church readily grants a dispensation from the interpellations, and permits the converted partner to marry again, *even when there is no decisive proof that the other party separates* (2); though this seems to be an essential condition of the Pauline privilege. We must also observe that the Holy See considers such marriages as valid, *even when it afterwards comes to light that the infidel was in no sense ill disposed at the time that the convert contracted a second marriage, or had even already received baptism* (3).

1. We have seen that in the case of polygamy, the interpellation as to the wish to receive baptism is, in general, sufficient, since the Church commonly dispenses from the other interpellation; but this only empowers the convert to marry before the Church one of his pseudo-wives who consents to become a Christian, and not a stranger.

2. This uncertainty exists not only when the Church dispenses from the interpellations, but also when she permits them to be made *before* baptism.

3. « Quae quidem matrimonia (contracta scil. absque praevia interpellatione, ab hac impetrata dispensatione), etiamsi postea innotuerit conjuges priores infideles suam voluntatem juste impeditos declarare non potuisse, et ad fidem etiam tempore contracti secundi matrimonii conversos fuisse, nihilominus rescindi nunquam debere, sed *valida et firma*, prolemque inde suscipiendam legitimam fore decernimus ». These are the words of Gregory XIII, in his Constitution, *Populis ac nationibus*, of 25 Jan. 1585, *Collectan.*, n° 1307, compare with n° 1309, towards the end, where we find similar words in the Const., *In suprema* of Benedict XIV, 16 Jan. 1745. See also the *Instruct.* of the C. S. O., 4 Feb. 1891, in the *Acta S. Sedis*, t. XXVI, p. 62 s., towards the end.

Notice that this principle applies only to marriage thus contracted *with a dispensation*, from interpellation; for if, when marriage has been contracted

Now, if under these circumstances the second marriage is declared valid, the former must necessarily have been dissolved ; and, as we cannot say that it was dissolved in virtue of the Pauline privilege, since the essential conditions for that are wanting here, apparently we can only conclude *that it has been dissolved by the authority of the Sovereign Pontiff* ⁽¹⁾ : so that we must recognise that the Pope has the power to dissolve the bond of legitimate marriage even after its consummation, supposing, of course, the baptism of one of the parties ⁽²⁾.

When once this power is admitted ⁽³⁾, it is easy to understand the readiness with which the Church, as we have seen, solves to the advantage of the faith, i. e., in favour of the of the liberty of the convert, the doubts that may exist as to the validity of the marriage contracted before baptism, and the fulfilment of the conditions of the *Casus Apostoli*.

In pronouncing such doubtful marriages invalid, the Church does more than make a mere declaration ; and, in fact, dissolves, as far as it may be necessary, the bond that restrains the liberty of the baptized partner. It is well known that the Church does not show a like readiness with regard to the marriages of the faithful ⁽⁴⁾.

with the preliminary interpellation and without a dispensation, the fact of the baptism of the infidel party, before the second marriage of the previously converted party, is established, that second marriage would be invalid, and the original marriage would retain its validity until dissolved in some other way, as for instance, by the exercise of the Papal authority.

1. Gregory XIII seems to recognise this power when he says in the Const., quoted above : « huiusmodi connubia inter infideles contracta, vera quidem, *non tamen adeo rata censeantur ut necessitate suadente dissolvi non possint* ».

2. The act of dissolving the marriages is implicitly contained in that of granting a dispensation from the interpellation, or rather in the dispensation from observing the conditions of the *Casus Apostoli*.

3. Many authorities in favour of this opinion may be found in the *Coll. Brug.*, t. IV, p. 350, and in DE BECKER, *De Matr.*, p. 457.

4. The decree of the C. S. O., of 18 May 1892, ad 1^m, emphasises this difference : « *Infideles* who declare on oath that they have not contracted an indissoluble marriage are believed without further evidence, and permitted to contract a new marriage, while *Christians* must bring forward some legitimate proof ». *Collectan.*, n° 2185. See also above, at the end of n° 191 ; *The Cath. Encyclop.*, under *Divorce*, V, p. 61 (Lehmkuhl).

The reason why the Church has not, up to the present, openly claimed this power, according to DE BECKER, *De Matr.*, p. 460, is to be found in the fear « lest the faithful in their weakness and ignorance of these matters should misunderstand its doctrine, especially in these days when the law of civil divorce has unhappily been introduced into so many countries, and come to look upon the divine law regarding the absolute indissolubility of consummated marriage between Christians as of little importance ». See above, n° 188.

PARAGRAPH IV. THE ABSOLUTE INDISSOLUBILITY OF MARRIAGE RATUM CONSUMMATUM.

We have already shown that every validly contracted marriage is indissoluble by the natural and divine law, but that, nevertheless, this law of indissolubility admits of various derogations ; that *within certain limits* the conjugal bond may be *dissolved by divine authority*, either by a general provision, or by a dispensation given for a particular case (either immediately by the divine authority, or mediately through the agency of the Church). We have also shown that this involves no contradiction, since this restricted dissolubility contravenes only the *secondary* principles of the natural law.

These derogations, as we have explained, affect marriage *ratum non consummatum*, as well as marriage *legitimum*, whether consummated or not, as also marriage *consummatum et ratum*.

197.
The absolute
indissolubili-
ty of marri-
age *ratum*
consumma-
tum is proved
a posteriori,

Now, as regards marriage *ratum consummatum* : the bond established by it is certainly stronger than that of marriage that is merely *ratum* ; nevertheless, the principles that we have laid down above logically lead us to affirm that, in its nature, there is no reason why it should not admit of dissolution by the divine power, or why that power should not be delegated to the Church.

It is, therefore, simply a *question of fact*. Has God, in fact, conferred such a power upon His Church ?

In accordance with the authentic teaching of the Church and the constant Tradition of the Fathers, in opposition to the teaching of Protestants and Greeks (!), we hold, that *marriage*

1. See below, in note ; also n° 202a.

ratum consummatum is absolutely immune from any dissolution, even in the case of adultery (¹). We shall now proceed to make this clear, giving special attention to those points and documents which present some difficulty.

I. TEACHING OF THE CHURCH.

A. Canons of the Councils and Synods.

Most of the canons affirm the principle of indissolubility, and many of them explicitly insist on it even in connection with the case of adultery. We mention in particular canons 8 and 9 of the council of *Elvira* (*Illiberitan.*), in 300 (²); canon 8 of the 11th Synod of *Carthage*, 407 (³); canon 6 of the council of *Angers* (*Andigav.*), 435 (⁴); canon 12 of the council of *Nantes* (*Nanneten.*), probably held in 685 (⁵); canon 10 of the council of *Hereford*,

1. by the teaching of the Church :
in the Councils and Synods.

1. This case would be the case most easily admitting of dissolution; and in fact, as we shall see, some Catholics have from time to time maintained this opinion, relying on the somewhat obscure passage of Matth., XIX, 9,

2. « Item feminae quae, nulla praecedente causa, reliquerint viros suos, et se copulaverint aliis, nec in fine accipiant communionem ». — « Item fidelis femina quae adulterum maritum reliquerit fidelem, et alterum ducit, prohibeatur ne ducat; si autem duxerit, non prius accipiat communionem nisi quem reliquerit prius de sacculo exierit; nisi forte necessitas infirmitatis compulerit ». HARDOUIN, o. c., I, col. 251; c. 8, C. XXXII, 7; cf. HÉFELÉ-LECLERCQ, o. c., I^a, p. 212 ss.

OTT, o. c., p. 48 ss., quotes also canons 10 and 11, 65 and 70; in his opinion they are more favourable to the husband, and are not opposed to his re-marriage, where his wife has committed adultery.

3. « Placuit ut, secundum Evangelium et Apostolicam disciplinam, neque dimissus ab uxore neque dimissa a marito alteri conjungantur, sed ita mancant aut sibimet reconcilientur. Quodsi contempserint, ad poenitentiam redigantur ». HARDOUIN, o. c., I, col. 923; HÉFELÉ-LECLERCQ, o. c., II^a, p. 156 ss.; GEFFCKEN, o. c., p. 31; c. 5, C. XXXII, qu. 7, where the canon of which we are speaking is ascribed to the council of Milevis.

4. « Hi quoque qui alienis uxoribus, superstitibus ipsorum maritis, nomine conjugii abutuntur, a communione habeantur extranei ». HARDOUIN, o. c., II, col. 779; HÉFELÉ-LECLERCQ, o. c., II^a, p. 883 ss.

5. « Si cujus uxor adulterium perpetravit et hoc a viro deprehensum fuerit et publicatum, dimittat uxorem, si voluerit, propter fornicationem..., illa vivente, nullatenus aliam accipiat... Similis forma et in muliere servabitur: si eam vir adulteraverit, habet potestatem dimittendi virum propter fornicationem, maneat tamen innupta, quamdiu vir ejus vixerit ». HÉFELÉ-LECLERCQ, o. c., III^a, p. 296 ss.; FREISEN, o. c., p. 781; but consult GEFFCKEN, o. c., p. 54, FAHRNER, o. c., p. 60 s. and HÉFELÉ-LECLERCQ, o. c., III^a, p. 1247; they observe that the canons ascribed to the council of Nantes more probably belong to the ninth century.

673 ⁽¹⁾ ; canon 10 of the council of *Friuli (Forojuliani)*, 796 ⁽²⁾ ; the decree for the Armenians, in the council of *Florence* ⁽³⁾ ; and canon 7, Sess. XXIV, of the council of *Trent* ⁽⁴⁾.

1. « Nullus conjugem propriam, nisi, ut sanctum Evangelium docet, fornicationis causa, relinquat. Quodsi quisquam propriam expulerit conjugem, legitimo matrimonio junctam, si Christianus esse recte voluerit, nulli alteri copuletur, sed ita permaneat, aut propriae reconcilietur conjugi ». HARDOUIN, o. c., III, col. 1017 s. ; HÉFELÉ-LECLERCQ, o. c., III^a, p. 310 ss. ; BÖCKENHOFF, o. c., p. 40 s.

2. « Item placuit ut, resoluta fornicationis causa jugali vinculo, non liceat viro, quamdiu adultera vivit, aliam uxorem ducere, licet sit adultera ». HARDOUIN, o. c., IV, col. 859 ; HÉFELÉ-LECLERCQ, o. c., III^a, p. 1093 ss.

3. « Quamvis autem ex causa fornicationis liceat tori separationem facere, non tamen aliud matrimonium contrahere fas est, cum matrimonii legitime contracti vinculum perpetuum sit ». DENZINGER, *Enchiridion*, n. 702.

4. « Si quis dixerit Ecclesiam errare, quum docuit et docet, juxta evangelicam et apostolicam doctrinam, propter adulterium alterius conjugum matrimonii vinculum non posse dissolvi ; et utrumque, vel etiam innocentem, qui causam adulterio non dedit, non posse, altero conjuge vivente, aliud matrimonium contrahere ; moecharique eum qui, dimissa adultera, aliam duxerit, et eam quae, dimisso adultero, alii nupserit, anathema sit ».

It is right to remark here that the Tridentine Fathers, at the request of the Venetian ambassadors, modified the first draught of this decree, according to which the indissolubility of marriage in the case of adultery was *directly* taught under pain of anathema ; thus the excommunication, as it now stands, affects only those who accuse the Latin Church of error, and consequently not the Greeks. On this subject see THEINER, o. c., II ; on p. 312 he gives the form originally proposed, and on p. 338, the petition of the ambassadors of the Republic of Venice.

Nevertheless, in substance, as *concerns the doctrine itself*, and not the way in which it is proposed, the two forms are identical ; and those who, like the Greeks, defend and put in practice the dissolubility of marriage on account of adultery, are guilty, if not of heresy, at least of undoubted error approaching heresy. We cannot, therefore, call this a disciplinary decree ; on the contrary, it is a doctrinal decree ; and it authoritatively teaches that marriage cannot be dissolved on account of adultery. The Greeks take up an illogical position, when in theory and practice they uphold the dissolubility of marriage, and at the same time refrain from accusing of error the Latins who maintain the contrary. Cf. Benedict XIV, *De Syn. dioec.*, l. XIII, c. 22, n° 4, who declares that documents emanating from the Holy See have, on many occasions, vindicated this doctrine, « and solemnly proclaimed the Catholic dogma against the erroneous idea of the Greeks, who pretend that adultery dissolves the bond of marriage » ; PERRONE, o. c., III, p. 359-388 ; PALMIERI, o. c., p. 141 s. ; SASSE, o. c., II, p. 415 s. 426 s. ; VACANT-MANGENOT, *Dictionnaire de Théologie catholique*, Vo *Adultere (L') et le lien du mariage d'après le Concile de Trente*, col. 498-505.

We may add to this list other concordant, *though less explicit*, canons : canon 48 of the *apostolic* canons ⁽¹⁾; canon 10 of the council of Arles, 314 ⁽²⁾; canon 19 of the first Synod called S. *Patritii*, 450-456 ⁽³⁾; canon 25 of the council of *Agde* (*Agathensis*), 506 ⁽⁴⁾; canon 9 of the Synod of *Soissons* (*Suessoniensis*), 744 ⁽⁵⁾.

These latter documents either employ general formulas, like the apostolic canons, the canons of St. Patrick, and those of Soissons; or, while clearly affirming the principle of indissolubility, they exercise prudence in the application of it, and in the method of imposing it, especially with regard to adultery; their reticence is to be attributed to the weakness of young married persons, and especially to the customs then existing and to the civil laws of the time, which regulated marriage and greatly favoured divorce ⁽⁶⁾.

This *practical economy* is especially apparent in the councils of *Arles* and of *Agde*. The former clearly lays down the proposition of strict indissolubility, both in the text and in the heading of the chapter : « *That the husband whose wife has committed adultery, cannot*

1. « Si quis laicus uxorem propriam pellens, alteram vel ab alio dimissam duxerit, communione privetur ». HARDOUIN, o. c., I, col. 38; FREISEN, o. c., p. 771; HÉFELÉ-LECLERCQ, o. c., I^a, p. 632 s., classes this canon among the most ancient.

2. « De his qui conjuges suas in adulterio deprehendunt, et idem sunt adolescentes, et prohibentur nubere, placuit ut, in quantum potest, *consilium* eis detur, ne viventibus uxoribus, licet adulteris, alias accipiant ». HARDOUIN, o. c., I, col. 265; HÉFELÉ-LECLERCQ, o. c., I^a, p. 275 ss.

3. « Mulier christiana, quae acceperit virum honestis nuptiis, et postmodum discesserit a primo et junxerit se adulterio (*aliàs* adultero), quae hanc fecit excommunicationis sit ». HARDOUIN, o. c., I, col. 1792; HÉFELÉ-LECLERCQ, o. c., II^a, p. 888 ss.

4. See the text in HARDOUIN, o. c., II, col. 1001; see also HÉFELÉ-LECLERCQ, o. c., II^a, p. 973; FREISEN, o. c., p. 781; FAHRNER, o. c., p. 60.

5. The text is given in HARDOUIN, o. c., III, col. 1934; see HÉFELÉ-LECLERCQ, o. c., III^a, p. 854 ss. and 1248 s.; FREISEN, o. c., p. 782; FAHRNER, o. c., p. 72.

6. The excessive laxity of the civil laws that then had the exclusive control of marriage, was the principal reason that prevented the Church, before the tenth century, from showing inflexibility everywhere and at all times in the matter of indissolubility. Inveterate customs and existing laws, sanctioned even by Christian kings, forced it to be prudent and tolerant, and to advance slowly in the task of bringing the laws and customs into accord with the strict teaching. Cf. FAHRNER, o. c., p. 61 s. and p. 75 s.; BÖCKENHOFF, p. 45 s.; see also what we say below, nos 203a and 203b.

take another during the lifetime of the former » ; and, nevertheless, it goes on to suggest that in practice the course to be adopted is one of persuasion. In the latter council, the Bishops endeavour to transfer divorce cases to their own tribunal, and so to withdraw them from the civil jurisdiction which was always too ready to quash marriages ; they declare that those who sue for divorce without the consent of the Bishop, expose themselves to canonical penalties ; nevertheless they refrain from declaring the principle of indissolubility absolutely strict and binding.

in the decrees
of the
Sovereign
Pontiffs ;

B. Decrees of the Sovereign Pontiffs.

The principal decrees, from our point of view, are those of *Innocent I* (401-417), to Exuperius of Toulouse ⁽¹⁾, to Probus ⁽²⁾ and to Victricius ⁽³⁾ ; those of *Leo I* (440-461), to Nicetas ⁽⁴⁾ ; of *Zachary* (741-752), to Pepin ⁽⁵⁾ ; of *Stephen II* (754) ⁽⁶⁾ ; *Alexan-*

1. « De his requisivit dilectio tua qui, interveniente repudio, alii se matrimonio copularunt. Quos in utraque parte adulteros esse manifestum est... Qui vero, vel uxore vivente, quamvis dissociatum videatur esse conjugium, ad aliam copulam festinarunt, neque possunt adulteri non videri ». HARDOUIN, o. c., I, col. 1005, c. 6.

2. « We declare in accordance with the Catholic faith... that the union with a second wife during the lifetime of the first, cannot be in any way lawful, even after divorce and repudiation (nec divortio ejecta) ». HARDOUIN, o. c., I, col. 1008.

3. « Sic enim de omnibus haec ratio custoditur, ut quaecunque, vivente viro, alteri nupserit, habeatur adultera nec ei agenda poenitentiae licentia concedatur, nisi unus ex eis defunctus fuerit ». HARDOUIN, o. c., I, col. 1002.

4. The first chapter of this Pontifical document concerns wives whose husbands have been reduced to captivity and are looked upon as dead, and who have consequently married again. The Pope says that, if the first husbands are restored to liberty and return to their homes, « we must hold that these lawful unions are to be resumed... everything ought to be done that each may recover his right ». *Ibid.*, c. 3. HARDOUIN, o. c., I, col. 1770.

5. He insists on the prohibition forbidding the party who puts away his partner, to contract a fresh marriage, and appeals (ch. 7) to the 48th Apostolic Canon, and also (ch. 12) to the canon of the 11th Synod of Carthage, already mentioned. See the text of the two canons in HARDOUIN, o. c., III, col., 1902 and 1903.

6. Chapter 5 of the rescript of Stephen II asks « if a husband who has repudiated his wife can take another during the lifetime of the former », and answers word for word from the text of Innocent I to Exuperius, as quoted above. Further on, ch. 19, the case is put of a wife who married again during

der III ⁽¹⁾ ; of *Innocent III* ⁽²⁾ ; and of *Leo XIII* in the Encyclical *Arcanum* ⁽³⁾.

The teaching of the Holy See is no less manifest in the determined resistance that it made to kings and princes who endeavoured to set aside the law of indissolubility ⁽⁴⁾. It is enough to mention Lothaire ⁽⁵⁾, Philip Augustus of France ⁽⁶⁾, Henry VIII of England ⁽⁷⁾, etc. ⁽⁸⁾.

the captivity of her first husband, who subsequently returned home. Here again it is the solution given by Leo I, in his rescript to Nicetas, that is adopted. Cf. HARDOUIN, o. c., III, col. 1987 and 1988.

1. C. 7, X, III, 35 ; see the text above in n° 188.

2. C. 7 and 8, X, IV, 19.

3. « In the great confusion of opinions, however, which spreads more widely day by day, it should further be known that no power can dissolve the bond of Christian marriage when it has been *ratified and consummated* ; and that therefore those husbands and wives are guilty of a manifest crime who wish, for whatsoever reason it may be, to be united in a second marriage before the first one has been ended by death ». *Authorised Translation*, London, 1880.

4. Leo XIII, in the Encycl. *Arcanum*, extols this invincible resistance on the part of the Church.

5. After having repudiated his wife Teutberge in 857, *Lothaire* wished to marry Waldrade, with whom he was living in marital relations. He endeavoured to obtain a declaration of nullity against his first marriage (see below, n° 242, in the note) ; and having extorted it from several bishops, he publicly celebrated his nuptials with his concubine. But the Pope Nicholas, intervened and resolutely resisted the wishes of the king. He stood his ground with heroic firmness, and only laid aside his arms when Lothaire had dismissed Waldrade and taken back his lawful wife. Cf. HÉFELÉ-LECLERCQ, o. c., IV¹, p. 237 ss. ; comp. n° 242, in the note.

6. *Philip Augustus* from the morrow of his marriage, had broken with his wife Ingeburge, with the intention of marrying Anne of Méran. At his instance, some of the bishops of France consented to declare his former marriage null. The queen, in her misfortune, appealed to Innocent III, who quashed the decision of the bishops, laid the whole of France under an interdict, and so forced the king to take back Ingeburge. See COULON, *Le Divorce*, p. 155-161 ; CASTELEIN, o. c., p. 550 s.

7. Henry VIII had first married, by dispensation, Catherine of Arragon, his brother's widow. At a later date, when his affections had fallen on Anne Boleyn, he claimed to have his marriage annulled, and succeeded in doing so before a tribunal of English bishops, who put forward as a pretext the invalidity of the dispensation in so near a degree. Clement VII, in 1534, proclaimed the marriage with Catherine of Arragon valid and indissoluble, and allowed the king and the whole country to fall into schism, rather than go against the principle. See below, n. 304, and above, n. 178, where we mentioned that Clement VII seems to have hesitated and, at first, to have been inclined towards permitting polygamy to Henry VIII, in such a way as to take another wife whilst still keeping Catherine.

8. Pius VII, in 1806, showed himself equally firm in resisting the entreaties

This same doctrine caused the Roman Pontiffs, even from the earliest ages, when the Church had not as yet effectively taken in hand the regulation of marriage, to exert their influence on the civil laws, both Roman and Barbarian, in order to bring them little by little more into accord with the law of Christian marriage. Above all, the Church strove to establish equality between man and woman, and to do away with the right which the husband alone formerly enjoyed of divorcing his wife almost at will ; it further exerted itself to diminish the number of causes of divorce, to render the obtaining of it more difficult, and the consequences more burdensome ⁽¹⁾ ; finally it succeeded in having the principle of indissolubility recognised and sanctioned by the civil authority. Even the adversaries of the Church acknowledge the salutary and preponderating influence exercised by it in this matter ⁽²⁾.

Some of them, however, urge against us instances of dissolution pronounced by the Holy See in favour of royal and distinguished personages ; but a closer examination reveals the fact that these were cases either of *non-consummated* marriage ⁽³⁾ or of *simple declaration of nullity* ⁽⁴⁾. There is a great difference between such a declaration and an act that directly dissolves

and threats of Napoleon, who wished to force him to dissolve the marriage of his brother Jerome. Cf. WELSCHLINGER, o. c., p. 83 ; *Revue prat. d'Apolog.*, 1911, t. XI, p. 775 ; *Dict. apolog. de la Foi cath.* (A. d'Alès), 1910, under *Divorce des Princes et l'Eglise* ; BÖCKENHOFF, o. c., p. 41-44.

1. See below, nos 203 and 203b ; in the latter passage we speak of the influence of Christianity on the ancient civil laws of the Germans in the matter of divorce. This influence made itself felt later in some instances, as several German tribes had embraced Arianism before their conversion to the Catholic Faith.

2. Cf. GEFFCKEN, o. c., p. 45 s. and 51 ; LEMAIRE, o. c., p. 25 s., who also treats of this influence.

3. Such was the dissolution pronounced by Alexander VI in favour of Lucrezia Borgia ; cf. PASTOR, *Histoire des Papes* (tr. de Furcy Raynaud), 1898, t. V, p. 498 s., who notes that the marriage had been denounced at Rome as non-consummated.

4. A recent example is the decision given in the case of the marriage of the Prince of Monaco with the Princess Hamilton. This marriage was *declared null* on the grounds of violence and fear. Cf. BONOMELLI, o. c., 54.

the conjugal bond ; some public assemblies and even some jurists would do well to bear this in mind (¹).

II. TEACHING OF THE FATHERS AND ECCLESIASTICAL WRITERS.

It is impossible for us here to enter fully into this matter, and we must refer the reader to writers who make it their special business to do so. We may mention PERRONE, o. c., III, p. 219-352 ; CIGOI, o. c., ; DE ROSKOVANY (²) ; PALMIERI, o. c., p. 141 ss. (³) ; DENNER, o. c. ; OTT, o. c., ; ROUËT DE JOURNAL, o. c.

198.
2. by the
teaching of
the Fathers
and ecclesiastical
writers.

We confine ourselves to a few general observations :

1. The greater part of the Fathers and writers of the *earliest centuries* (they may be easily found on referring to the works we have just enumerated), proclaim the absolute indissolubility of marriage *ratum consummatum*, and not unfrequently they do so with express reference to the case of repudiation for adultery (⁴).

1. Cf. PISANI, o. c.; BOUDINHON, *Le mariage religieux*, p. 62 s.

It was also merely a declaratory sentence that was pronounced by Alexander VI, in the case of the marriage of Louis XII of France and queen Joan, and by Clement VIII in that of Henry IV. This latter marriage in particular was declared null in the first place, on account of a diriment impediment which had not been removed by dispensation, and secondly, because the consent of the queen had not been freely given.

As regards the marriage of Napoleon with Josephine de Beauharnais, Pius VII always refused to confirm the sentence of nullity officially pronounced in Paris, based on the absence of witnesses at the time of the celebration of the marriage, and on the want of consent on the part of the emperor, as having, in 1804, reluctantly given his consent, being constrained by Pius VII, in order to validate his civil marriage of 1796. Cf. WELSCHINGER, o. c. ; *Études*, t. XXXVIII, p. 606 ss.

2. *Supplementa ad collectiones monumentorum*, I, p. 457 s.

3. See also QUINQUET DE MONJOUR, o. c., p. 48-53 and 81-100.

4. One wonders what fixed idea impels certain authors, like DESSAULES, o. c., p. 202 s., to make the wild statement : « que S. Augustin pose le premier le principe de l'indissolubilité absolue, même en cas d'adultère, et le fait adopter en principe dans l'Eglise d'Occident ». Alex. Dumas (fils), quoted by QUINQUET DE MONJOUR, o. c., p. 50, especially distinguishes himself in this way in his work, *La Question du Divorce*, p. 213 : « Le divorce a été consenti et approuvé par l'Eglise pendant les huit premiers siècles... Les Conciles jusqu'à cette époque, ou ne parlent pas du divorce (ce qui démontre qu'ils l'admettent (!), ou le consacrent ou le tolèrent ». To these vagaries we oppose the opinion, beyond suspicion of partiality, of LÖNING, o. c., II, p. 607 : « Es findet sich aus den ersten drei Jahrhunderten kein Zeugniß dafür, dass die Kirche Wiederverheirathung

On the other hand, their writings show that the *practice* of the faithful was not always in conformity with this theory. Thus *Origen* complains that « contrary to the Scripture law, some rulers in the Church permitted a woman to marry again during the lifetime of her husband » ⁽¹⁾. *S. Asterius Amasenus* inveighs against his contemporaries who change their wives like their garments, and whose marriage beds are as readily moved as the boots at a fair ⁽²⁾; while *St. Augustine* says ⁽³⁾: « who does not know how rare are those wives who live so chastely with their husbands, that they never seek for others, even at the risk of repudiation ? » These disorders were greatly promoted by the civil laws in force at the time ⁽⁴⁾.

2. *At a later date*, especially from the beginning of the IXth century, the doctrine of absolute indissolubility became altogether unanimous, and the Doctors attached so much importance to it, that many of them applied it to *all* true marriage without distinction. The practice of sometimes dissolving non-consummated marriage became a difficulty to them, and to reconcile it with their theory they denied such the title of true marriage, and recognised in it only an inceptive marriage ⁽⁵⁾. This was the case with Hincmar of Rheims ⁽⁶⁾ and the Doctors of the School of Bologna, and thus Gratian argues, qu. 7, Causa XXXII.

III. DOCUMENTS THAT PRESENT SOME DIFFICULTY.

A. Texts of Scripture.

A difficulty arises from two passages in St. Matthew, V, 32 ⁽⁷⁾ and XIX,

eines geschiedenen Ehegatten bei Lebzeiten des ander Theils für schriftgemäss gehalten hätte ».

1. *Comment. in Matth.*, t. XIV, n. 23, in *Migne*, XIII, col. 1246.

2. *Homelia in locum Evangelii sec. Matth.*: *an liceat homini dimittere uxorem suam quacunque ex causa*. *Migne*, XL, (P. Gr.), col. 227.

3. *De conjugii adulterinis*, II, ch. 17; *Migne*, XL, col. 483 s.

4. Cf. LÖNING, o. c., II, p. 607 ss.

5. See above, nos 60 and 187, on the subject of the *copulatheoria*.

6. GEFFCKEN, o. c., p. 60 s., gives the substance of the teaching of Hincmar, put forward especially on the occasion of the divorce of Lothaire. See also SCHRÖRS and SDRÁLEK, o. c. Hincmar's account of the divorce of Lothaire may be found in *Migne*, CXXV, col. 619-772.

7. « But I say to you, that whosoever shall put away his wife, *excepting the cause of fornication* (παρεκτὸς λόγου πορνείας), maketh her to commit adultery; and he that shall marry her that is put away, committeth adultery ».

9⁽¹⁾, from which it would at first sight seem that we might conclude : *therefore* he who puts away his adulterous wife does *not* make her commit adultery ; — and he who puts away his wife for fornication and takes another, does *not* commit adultery.

1.S. *Matth.*,
V, 32 and
XIX, 9 ;

Assuming that the texts in question are authentic⁽²⁾ ; that they relate to lawful⁽³⁾, Christian⁽⁴⁾, consummated marriage ; and that fornication is here taken for an act subsequent to marriage⁽⁵⁾ : we say : *that the passages quoted are perfectly reconcilable with the Catholic doctrine concerning the absolute indissolubility of marriage* ratum consummatum. The **proof** is as follows :

1. **Indirect proof** : there are several objections to the admissibility of the interpretation from which the difficulty arises.

a) *indirect solution ;*

a/ In the first place, the very *opposition*, that the texts clearly set forth, between the imperfection of the Mosaic law and the perfection of the New Law, with relation to marriage, is on our side ; for it is there said that the new law restores marriage to its original stability ; that it had been derogated from, out of condescension to the hardness of heart of the Jews ; and that this derogation must now come to an end. Cf. V, 31-32 and XIX, 8-9.

1. « Whosoever shall put away his wife, *except it be for fornication* (μὴ ἐπὶ πορνείᾳ), and shall marry another, committeth adultery ; and he that shall marry her that is put away, committeth adultery ».

2. LOISY holds the contrary, in his *Evangelies Synoptiques*, t. I, p. 575 s. ; but the most ancient manuscripts contain the difficulty in question. Cf. VILLIEN, *Divorce*, col. 1451. Circa variantes lectiones, videsis WATKINS, o. c., p. 153-167.

3. Some writers have held that this is here a question of concubinage, as if Christ had said that marriage could be dissolved only when the union was irregular ; but the text and the whole context are opposed to this explanation ; there is no question of other than duly contracted marriage. Cf. OTT, o. c., p. 261 ss.

4. Others have imagined that the words of Christ concerned *Jewish* marriage, and permitted dissolution in case of adultery : but again, they do not take into account the whole context, which clearly shows that it is a question of marriage opposed to that of the Jews. Cf. V, 31-32, XIX, 8-9. Other writers have been of opinion that Our Lord had in view marriages *contracted in infidelity*, and here taught that the bond of such unions could be broken in the Casus Apostoli. They understood πορνεία in the sense of ἀπιστία. See OTT, o. c., p. 254-61.

5. There are also some who understand the word *fornication*, πορνεία, in its strict sense, as a sexual act *preceding marriage* ; and they see therein a scriptural reason for dissolving the subsequent marriage, which would be invalid because contracted under the implied condition of virginity, like that mentioned in *Deut.*, XXII, 13-22. See in PERRONE, o. c., III, p. 161 ss., the account and refutation of this opinion ; and cf. OTT, o. c., p. 230 ss.

This opposition is the more significant, as the expression λόγος πορνείας corresponds to the Hebrew *erwath dahbar*, as understood by the school of Schammai, which permitted the Jews dissolution of the bond in case of *erwath*. If then Christ had permitted divorce for fornication (πορνεία), his teaching on the subject of marriage, would have been neither more strict nor more perfect than that of the Jews who belonged to the school of Schammai.

b/ *The parallel passages* of Mark X, 11⁽¹⁾, and of Luke XVI, 18⁽²⁾, make Christ say absolutely and without restriction, that the husband who puts away his wife and takes another commits adultery.

c/ *The second part of verse 32*, in the Vth chapter of St. Matthew⁽³⁾, declares without reserve or exception that he that shall marry her that is put away, committeth adultery; but this would not be true if, as most Protestants and Greeks pretend, the wife put away for adultery were set free from the conjugal bond⁽⁴⁾.

d/ Moreover, if the sin of adultery had the power of dissolving the marriage, her guilt would give the repudiated wife an advantage; and this would prove an incitement to adultery⁽⁵⁾. This argument, though wholly indirect, is not without force.

1. « Whosoever shall put away his wife and marry another, committeth adultery against her ». The parallelism is yet more striking when the two Greek texts are compared. Cf. the ed. NESTLE.

2. « Everyone that putteth away his wife, and marrieth another, committeth adultery; and he that marrieth her that is put away from her husband, committeth adultery ».

3. This second part of the verse is omitted in the Greek edition of NESTLE, Matth., XIX, 9; but cf. KNABENBAUWER, *Commentarius in Evang. sec. S. Matthaeum*, II. p. 138, who gives the Mss. that retain, and those that omit it.

4. « Gerade diese ausnahmslose Fassung zeigt deutlich, dass von irgend einer erlaubten und darum auch vor Gott gültigen Entlassung keine Rede ist ». B. WEISS, *Das Matthäus-Evangelium*, 1898, Göttingen, p. 118, where he says that it is « ganz willkürlich » to suggest supplying in the second part of the verse the same exception as in the first: excepting the cause of fornication; and the more so, as ZAHN remarks, *Das Evangelium des Matthäus*, Leipzig, 1903, p. 260, that « Die Wiederholung wesentlicher Satztheile in parallelen Darstellungen ähnlicher Fälle die Regel ist », as is apparent e. g., a little further on, in Matth. VI, 4, 6, 18.

5. « Christ would then, as it were, put a premium on adultery, since the adulterous wife would be free to contract a fresh marriage, the first being dissolved, while the innocent and chaste wife, unjustly repudiated by her husband, would be bound to perpetual continency. Would not this open the way to a multitude of crimes? If a husband had much to suffer from his wife, or if he were entangled in the toils of a disorderly attachment, would he not feel strongly impelled

e/ Finally, if the bond could still be broken on account of adultery, the disciples would have had no reason for crying out against the severity of the marriage law. Cf. Matth., XIX, 10.

2. **Direct proof:** without in any way twisting the text, it is possible *b) direct solution.* to give it a perfectly reasonable interpretation, that is quite in accord with Catholic doctrine, and excludes the dissolution of marriage on account of adultery.

a/ Let us take first the *first passage*, Matth. V, 32, and let us assume as logical the conclusion that some have drawn from it, viz... « *Therefore* he who puts away his adulterous wife, does not make her an adulteress ». Does it follow from this that the marriage bond is dissolved? We cannot see that it does. Granting that the outraged husband has the right to put her away, the text would simply affirm that the sin committed by the adulteress in marrying again, is not to be imputed to the husband who put her away ⁽¹⁾. Far from proclaiming the dissolution of the marriage, the passage would, on the contrary, state *indirectly and implicitly* that marriage with a woman thus put away, for any cause whatever, and even for adultery, is itself adultery. Thus the sense of the first part of the verse would fit in with that of the second part, where the same doctrine is taught directly and explicitly.

b/ Now, with regard to the second text, Matth. XIX, 9 ⁽²⁾. The words of Christ in this passage are capable of several interpretations :

a/ Some authors see in this an *ellipsis* to be supplied in the following way : he who shall put away his wife, *which is lawful only in the case of fornication*, and take another, commits adultery ; in this case the exception *regarding fornication* is limited, as far as the sense and grammatical construction are concerned, to the first part of the proposition, viz., he that *shall put away* ⁽³⁾. All that can be deduced from this is, that the wife may

to adultery, if such a sin could at once dissolve the marriage bond ? » KNABENBAUWER, O. C., I, p. 226.

1. It might also be understood thus : the husband who repudiates his adulterous wife, does not make her an adulteress, because she is one already through her own fault.

2. Those who are not altogether satisfied with the explanation given under a/ will find what follows applicable to V, 32, also. We are aware that some authors translate the Hebrew form *hiphil*, whence the Greek μοιχάσθαι ποιεῖ is derived, not by *facit eam moechari*, but by *adulterium opus ponit* (commits an act of adultery against her). Cf. OTT, O. C., p. 272 s. and 295. s.

3. QUINQUET DE MONJOUR, O. C., p. 12, proposes an analogous case : « Supposez une loi ainsi conçue : quiconque aura châtié son fils, sauf pour de graves raisons, et l'aura tué, sera puni. — Direz-vous qu'en certains cas le droit est donné au

be put away for fornication, that is to say, that the husband may separate from her, but that the conjugal bond remains unbroken ⁽¹⁾; and thus the text would serve to support the doctrine contained in the second part of V, « and he that shall marry her that is put away committeth adultery »; and St. Matthew would be in perfect agreement with St. Mark, X, 11, St. Luke, XVI, 18, and St. Paul, Ist Cor., VII, 11.

β/ Other interpreters give to the words, « except it be for fornication », a different sense. According to them, the words signify *that Our Lord abstracted altogether from the case* in which a man puts away his wife for fornication, and said nothing about it. This is the opinion of ZAHN, o. c., p. 583 s. : « Here also, as in V, 32 ⁽²⁾, Jesus excludes from His condemnation the case of an actual breach of the marriage vow resulting from unchastity on the part of the wife without saying what should be done, or what judgment should be passed in such a case »; and further : « The text gives no indication as to how Jesus would have decided in a case where a man leaves his wife without reasonable ground but without contracting a fresh marriage, or in a case where he puts away an adulterous wife, and then marries again » ⁽³⁾.

γ/ Finally there are some who understand the words παρεκτός λόγου πορνείας and μη ἐπὶ πορνείᾳ not in an exclusive but in an *inclusive* or comprehensive sense. The interpretation proposed by OISCHINGER ⁽⁴⁾ furnishes an example of this. According to him, the word παρεκτός (in the first passage, Matth., V, 32), may have either an exclusive or a comprehensive signification according to the context ⁽⁵⁾; and thus the

père de mettre son fils à mort, et que l'excuse absolutoire, l'impunité assurée aux coups, doit s'étendre au fait du meurtre ? ».

1. This putting away, which leaves the conjugal bond intact, and permits future reconciliation, is well described by St. Paul, I Cor., VII, 11, « And if she depart, that she remain unmarried, or be reconciled with her husband ».

2. On p. 238, he had already made the same observation with regard to V, 32 : « If, then, Jesus in condemning the man who leaves his wife, makes an exception in the case where adultery is the reason for separation, nothing more can be deduced from the text, than that the condemnation does not include that case ».

3. St. Augustine speaks in like terms (*De conjugiiis adulterinis*, I, c. 7; *Migne*, XL, col. 496 s.), « Cum dicimus : quicumque mulierem praeter causam fornicationis a viro dimissam duxerit, moechatur, de uno quidem ipsorum dicimus, nec tamen ideo moechari negamus eum qui eam duxerit quam propter causam fornicationis maritus dimiserit ».

4. *Die christliche Ehe*, Schaffhausen, 1850. Cf. OTT, o. c., p. 267 ss., and p. 289 ss., who adopts this interpretation of Mt., V, 32, and makes it still more evident,

5. OTT, o. c., p. 269 and 290 ss. brings some suggestive examples of it.

phrase, « si quis praeter causam fornicationis dimiserit uxorem moechatur », is susceptible of a double acceptation : viz., he who puts away his wife, except for fornication, commits adultery, and : he who puts away his wife, even for fornication, commits adultery. In the second passage, Mt., XIX, 9, the negative μή (and οὐ) can also signify, according to the context and circumstances, *not only* ; and in fact, St. Matthew himself employs it in this sense, IX, 10 ; IX, 20 ; XII, 7 ; also Osee, VI, 6. But, as we have shown above, the context and circumstances here call for this rendering (1).

All these considerations sufficiently show that St. Matthew in no way weakens the thesis of the absolute indissolubility of marriage *ratum et consummatum* (2). The three interpretations which we have proposed, on the contrary, strengthen it, or at least respect it. The traditional explanation, given under α/ is not without a certain difficulty, which is avoided by adopting that given under γ/. For, the first solution gives to the term *dimittere* a sense different from that which it had at the time of Our Lord, specially among the Jews : that is to say, the sense of sending away (the wife) from the house, while keeping intact the marriage bond, a sense which the parallel passages in Luke and Mark have not (3).

B. Doctrinal documents of the Church and the evidences of the Fathers and Doctors.

1. Certain decisions of Bishops and of episcopal tribunals are met with contrary to the law of indissolubility (4).

200.
2. from the
doctrine of
the Church ;

Moreover, some ecclesiastical documents, such as particular conciliar

1. Yet another explanation is given by OTT, o. c., p. 296 ss., for Matth., XIX, 9. According to him, the Hebrew word corresponding to the Greek μή is מִן, which, when used with the infinitive, may signify, according to GeseNIUS, *Hebr. u. Aram. Handwörterbuch*, « es kann nicht sein, es darf nicht » ; but one can very well here supply the infinitive (*dimittere*), omitted for conciseness, so that the sense would be : whosoever shall put away his wife — which is not permitted for fornication — and shall marry another, committeth adultery.

2. Even among Protestants there are found writers, such as ZAHN, WATKINS and B. WEISS, already mentioned, who share on this point the Catholic opinion. See the authors quoted in OTT, o. c., and cf. *Der Katholik*, XXXIV, p. 310 s. « *Die Bergpredigt und die Unauflöslichkeit der Ehe* ». Cf. also HARNACK, *Die Sprüche und Reden Jesu*, 1907, p. 42, s., and compare with p. 101.

3. Above, at the end of n° 152, our explanation indicates the interpretation proposed under γ/.

4. We are the first to acknowledge that the bishops who yielded to Lothaire, Philip Augustus and Henry VIII, failed in their duty and went against the traditional teaching of the Church. The same was the case in the matter of the divorce of Napoleon.

decrees ⁽¹⁾, which do not detract at all from the force of the unanimous and traditional teaching ; papal decrees of a disciplinary nature or, at least, not involving the question of infallibility ⁽²⁾, seem here and there to contradict

1. It must be admitted that canons 5 and 9 of the Council of Verberie (*Vermeriense*) 752, and canons 6, 13 and 16 of the Council of Compiègne (*Compediense*) 757, give decisions incompatible with the strict teaching. Thus, in particular, they grant dissolution of the conjugal bond in case of subsequent illegitimate affinity ; see above n° 139. Cf. HARDOUIN, o. c., III, col. 1989 ss. and 2003 ss. ; *Concilia Galliae*, ed. Sirmond, 1629, II, p. 1 ss. and 41 ; HÉFELÉ-LECLERCQ, o. c., III², p. 917 ss. and 940 ss. These canons appear to have been issued under the joint influence of the lay Princes who assisted at these synods, and of the prevailing customs ; and they were not approved as a whole by the Bishops present. Cf. FAHRNER, o. c., p. 74. s. ; VILLIEN, *Divorce*, l. c., col. 1464 ss. ; *The Cath. Encyclop.*, V° *Divorce* V. p. 57 s. See also what we shall have to say below presently. Many of the contemporary penitentials favoured this laxity ; FAHRNER, *ibid.*, p. 77 s. ; VILLIEN, *Divorce*, col. 1467 s.

2. The case referred to is that of Celestine III (1191-1198), who, *Comp.* II, 2, III, 20, permitted the dissolution of marriage *ratum et consummatum* when the husband, having become an apostate through hatred of religion, deserted his wife, and unduly extended the privilege of the Apostle to such a case. Innocent III (1198-1216), in c. 7, X, IV, 19, reformed this judgment, showing clearly by his words that it was the decision of Celestine III that he had in mind : « licet quidam praedecessor noster sensisse aliter videatur ». Cf. supra, n° 192 ; also the *Realencykl.*, under *Scheidungsrecht*, t. XXI, p. 861, where the fact in question furnishes an opportunity for a senseless objection against the dogma of infallibility.

The case of the rescript of Gregory II to Boniface (726) is different. It is given by HARDOUIN, o. c., III, col. 1858 s. « You have asked what is to be done by the husband of an infirm wife, incapable of rendering the marriage debt. It would be well that he should remain continent ; but as that is given only to great souls, let him who cannot observe continence rather marry, but let him not cease to support her who is separated from him by infirmity and not for any hateful fault ». There is no reason why we should say at once, with GRATIAN, in his *dictum* on c. 18, C. XXXII, qu. 7, that « these words of Gregory are quite contrary to the holy canons, and even to the evangelic and apostolic teaching ». On the contrary, we may maintain with MOY, o. c., 309 ss. ; SÄGMÜLLER, *Tub. Quartalschr.*, 1905, p. 84 s., and 1911, p. 93. ; *The Cath. Encyclop.*, V° *Divorce*, V, p. 59 ; WERNZ, o. c., IV, p. 499, that the marriage in question is declared dissolved on the ground of *antecedent impotency* ; for it was the custom of the Roman Church not to dissolve marriage for this reason, but to impose fraternal cohabitation. Gregory would be unwilling to apply this severe discipline to the Germans, because the practice was suited only to those who were strong in virtue. Or, again, we may say with FAHRNER, o. c., I, p. 62 s. ; FREISEN, o. c., p. 331 s., and SCHERER, o. c., p. 267, note 10, that there is question of an unconsummated

the doctrine that we have laid down. We admit this. But, in the first place, they prove nothing against the truth of this teaching ; and secondly, the documents in which the divergence is real and not merely apparent, are so few that they are quite overwhelmed by the weight of contrary evidence.

The number alleged is, indeed, great, but most of them are either of doubtful authenticity ⁽¹⁾, or are capable of being interpreted in an orthodox sense ⁽²⁾, or they lay down rules of conduct which leave the question of principle untouched, and occupy themselves only with its practical application, according to what we have said in n° 197, under A ⁽³⁾.

We may add that several decisions of the Holy See relating to matrimonial cases seem at first sight to contradict the traditional teaching, but are nevertheless in conformity with it, and concern unconsummated marriages,

marriage to be dissolved; or there may be admitted with ESMEIN, o.c., p. 59 s. and 75 (and, apparently, SEHLING, *Die Wirkungen*, p. 19, in note, and VILLIEN, *Divorce*, l.c., col. 1466 s.), that Gregory recommends some *toleration* and *practical adjustment* with the severe doctrine of absolute indissolubility, which he elsewhere inculcates (*Capitulare*, c. 6, in HARDOUIN, o.c., III, col. 1862), but which he thought he could not prudently impose in the present instance. We have made a like observation above in connection with certain canons of councils. In the case of Gregory there was the greater need to be tolerant and indulgent, and to avoid anything like a shock to the good faith of the people, as he was dealing with the recently converted Germans, whose customs so readily permitted divorce on the part of the husband. See also BOUDINHON, in the *R. cl. fr.*, 1909, t. LVIII, p. 470 ss.

1. E. g., the second Synod attributed to St. Patrick. Cf. HÉFELÉ-LECLERCQ, o. c., II², p. 888 ss.

2. Thus, among others, the second canon of the Synod of Vannes (*Venetica* in Brittany) 465, declares that communion must be refused to « those who, having deserted their wives... except for fornication, marry others without proof of adultery ». This decree might be understood, as by HÉFELÉ-DULARC, o. c., III, p. 194, in the sense that it does not absolve from all blame those who marry again, after the wife's infidelity has been proved, but that they must, nevertheless, be dealt with more gently than the others, as the Fathers of the Council of Elvira had already declared.

We meet also with decrees that authorise the repudiation of an adulterous wife and forbid her ever to marry again, while they permit the re-marriage of the innocent party. Once more, they have a meaning that squares with the true teaching, and may be understood as inflicting a penalty upon the guilty and sparing the innocent; i. e., the adulterous wife is forbidden to marry again, at any time whatever, while the husband is left free to do so, when no obstacle bars the way, and, in particular after the death of his wife. Consult MOY, o. c., p. 489, who adduces several parallel passages in support of this view.

3. In this way also BÖCKENHOFF, o. c., p. 47^s, explains the canons of the Councils of Verberie and Compiègne, of which we have just spoken above.

or involve only a declaration of nullity and not a dissolution of the bond. (See above, n° 197).

201.
3. from the
writings of
the Fathers.

2. The difficulty offered by certain passages in the *Fathers and ecclesiastical writers* is to be solved in a similar way. The ancient writings are searched for objections against the Catholic teaching, and some Catholic writers seem to lend themselves only too readily to the work of our opponents. Passages are alleged against us from *Hermas* ⁽¹⁾, *Tertullian* ⁽²⁾, *Lactantius* ⁽³⁾, *St. Hilary* ⁽⁴⁾, *St. Basil* ⁽⁵⁾, *St. Epiphanius* ⁽⁶⁾, *St. Asterius of Amasea* ⁽⁷⁾, *St. Cyril of Alexandria* ⁽⁸⁾, *Theodoretus of Cyr* ⁽⁹⁾, and *Pseudo-Ambrose* ⁽¹⁰⁾. But yet once more in all this cloud of witnesses, it is hard to find one who is clearly and incontestably in favour of dissolubility ⁽¹¹⁾, while innumerable passages support the impugned

1. Mandatum IV, cap. I. Cf. FUNCK, *Patres Apostolici*, p. 391 ss. See MOY, p. II ss.

2. *Adversus Marcionem*, l. IV, cap. 34, Ed. CEHLER, 1854.

3. *Instit. divin.*, VI, 23, *Migne*, VI, col. 720.

4. *Comment. in Mt.*, c. IV, n° 22.—*S. Hilarii Opera*, Ed. Maurini, Paris, 1693, col. 627.

5. *Epistola ad Amphiloichium*, 188 (the first among the canonical), cap. 9, *Migne*, XXXII, col. 678.

6. *Adversus haereses*, l. II, tom. I, Haer. 59 (39), c. 4, *Migne*, XLI, col. 1025-1026.

7. *Homilia in Matth.*, see n° 198.

8. Fragment of *Commentarius in Matth.*, in cap. V, 31, and *De Adoratione et cultu in spiritu et veritate*, l. VIII, in *Migne*, respectively t. LXXII, col. 380, and LXVIII, col. 584.

9. *Graecarum affectionum curatio*, Sermo IX, *Migne*, LXXXIII, col. 1053.

10. *Comment. in I. Cor.*, VII, *Migne*, XVIII, col. 218. See BARDENHEWER, o. c., p. 378 and 384, who remarks that the work is that of an uncertain author, who probably wrote at Rome between the years 370 and 375; others however regard him as a writer of the School of Antioch. See OTT, o. c., p. 98.

11. As regards the evidence of *Hermas*, *Lactantius*, *St. Asterius* and *St. Hilary*, we refer the reader to the texts quoted; an attentive perusal of them will show the justice of the claim that they are in accord with the common teaching. FREISEN, o. c., p. 770, is too free in calling in question the opinion of *Hermas* (as if he had not aimed at the case of adultery), of which *Geffcken* himself says, o. c., p. 19, : « klarer als *Hermas* es hier thut, kann man sich wohl kaum ausdrücken ». It may, however, be objected that *Hermas* seems to say that re-marriage is only forbidden to separated parties, in order that the guilty party may have time to come to a better mind; thence not a few, as *GEFFCKEN*, l. c., and also *FAHRNER*, o. c., p. 18, share the opinion that *Hermas* permits re-marriage in case of there being no longer any hope of coming to a better mind; against whom rightly argues OTT, o. c., p. 10 s. There are also writers, like *ESMEIN*, l. c., who attack the words of *St. Hilary*; we would remind them of the note of

doctrine. Among all the dogmas of the Church none, we may say, has been defended with greater uniformity and consistency than the principle

the Maurini on the passage in question : « Those who would deduce from this passage that St. Hilary permits not only the repudiation of a wife guilty of adultery, but also the taking of another wife, make him say what he neither says nor thinks, for he does but free the husband from the company of his adulterous wife ».

Concerning the opinion of *Tertullian*, many hold that it is contrary to the law of indissolubility, or at least doubtful : as ESMEIN, o. c., II, p. 49 ; QUINQUET DE MONJOUR, o. c., p. 12 ; DUMAS, o. c., p. 23 ; DESSAULES, o. c., p. 202 ; POTHIER, o. c., n 489 ; TURMEL, *Hist. de la théologie positive*, Paris, I, p. 157 s. and 349 ; as also OTT, o. c., p. 22-29 (see also VANDERVELDE, *Annales parlement. Belges*, 1904-1905, p. 108). In truth the words of Tertullian are somewhat obscure ; but on a close examination they will be found to be in accord with the strict teaching. The object of the passage in which we are interested is to show that there is no contradiction between the teaching of Christ and that of Moses, with relation to repudiation and divorce. Tertullian declares that on the one hand Moses did not grant divorce absolutely and without limitation, and that on the other hand Christ did not absolutely forbid it. Our Lord, he says, « now prohibited divorce conditionally, namely, to those who put away their wife *for the purpose of taking another* ». In other words, Christ permitted divorce and separation on condition that the parties remain without marrying again ; and Tertullian then concludes : « If He conditionally prohibited the repudiation of the wife, He did not prohibit it entirely ; He permitted it where the reason for which it was prohibited did not exist », i. e., He permitted divorce where it is not intended to marry again. Tertullian goes on to insist on the restriction put on the permitting of divorce, that is to say, on the *absence of re-marriage* : « he who shall put away his wife, He (Christ) says, and shall take another, is guilty of adultery, and he who marries her that is put away by her husband, is equally an adulterer, that is, if he marries a woman put away by her husband contrary to law, I mean with the intention of taking another », (qui dimiserit, inquit (Christus), uxorem et aliam duxerit, adulterium commisit, et qui a marito dimissam duxerit, aequè adulter est, ex eadem utique causa dimissam qua non licet dimitti, ut alia ducatur ; illicite enim dimissam pro indimissa ducens adulter est ; manet enim matrimonium, quod non rite diremptum est ; manente matrimonio, nubere adulterium est).

It would indeed have been surprising if the rigorist Tertullian had shown laxity in this matter, the more so, as at the time of writing his *Adversus Marcionem* (207-208) he was already inclined to Montanism. Moreover, in his book *De Patientia*, written a little before (200-206), he plainly supports the law of indissolubility.

On the other hand, we must recognise the fact that many Fathers and Eastern ecclesiastical writers, notably *St Basil*, *St. Epiphanius*, *Theodoret*, *Cyril of Alexandria*, *St. Asterius* and *Ambrosiaster* (if the last named can be counted among Easterns), in view of the customs of their time, which were very indul-

of the indissolubility of the marriage bond, notwithstanding its severity and the relative ambiguity of the Gospel text.

Note. In the whole of this article we have confined ourselves strictly to the indissolubility of marriage with regard to *the conjugal bond*; but above, in nos 132 s., we have determined the limits and lawfulness of simple *separation*, the bond itself remaining intact.

Corollary. From all that has gone before it follows, as a consequence, that only marriage *ratum et consummatum* is, under all conditions, *absolutely* indissoluble; to it alone, as Alexander III says, c. 7, X, III, 32, are the words of Our Lord fully applicable: it is not lawful for the husband to put away his wife. Without doubt legitimate marriage (whether consummated or not) is not dissoluble *so long as both the parties remain unbaptized*; but this is not due to the inherent stability of such bond, nor, strictly speaking, to the want of the requisite power on the part of the Church. The reason of it is that the unbaptized are not subjects of the Church, and consequently their marriages do not fall within its purview. This is why the Church can do nothing in the matter. The State also is unable to do anything, since the power of dissolving the marriage bond has not been delegated to it. In a word, such a bond has not an absolute indissolubility, but only one that is relative to the state of infidelity of the two parties.

gent towards husbands whose wives were guilty of adultery, inculcate much less strongly the law of strict indissolubility, and even at times, seem opposed to it. We doubt, however, if any one of them, apart from Ambrosiaster, openly declares, as a point of *orthodox doctrine*, that marriage may be dissolved *quoad vinculum* on account of adultery. In particular, as concerns *St Basil* and *St. Epiphanius*, some Catholic writers, and among them FAHRNER, o. c., I, p. 31 s.; SCHERER, o. c., p. 543 s.; FREISEN, o. c., p. 772; TURMEL, o. c., I; p. 157, and PHILIPPE in the *Canon. Contemp.*, 1902, p. 207, go too far, and do not give sufficient attention to the explanations offered by other writers, which at least exempt the texts in question from the charge of being in evident opposition to the Catholic teaching. See, e. g., PERRONE, o. c., III, p. 263 ss. and p. 278 ss.; AMORT, *Demonstratio critica religionis catholicae*, P. I, qu. 15; VACANT-MANGENOT, *Dictionnaire*, under *Adultère*, p. 481 s.; POIRTALE and CONDAMIN, *Bulletin de Littérature religieuse* (Toulouse), 1900, p. 16; DENNER, o. c., p. 47-56 and 64-68, and especially OTT, o. c., pp. 54-61 and 64-67.

Scholion I. The indissolubility of marriage before the schismatic Eastern Church and before the Protestant Church.

A. The ORIENTAL SCHISMATICS ⁽¹⁾ have generally adopted the causes of divorce admitted by Justinian, in the *Novella* 117 (see n° 203a). These causes are divided into two categories : the first affording ground for divorce *cum damno*, i. e., with a penalty against the guilty party ; and the second, permitting divorce *bona gratia*, i. e., without the addition of a penalty.

202a.
*Discipline of
the Schisma-
tic and
Protestant
churches.*

1. The following are the *causes of divorce cum damno* : treason against the fatherland (Hochverrath), attempt on the life of the partner, adultery and partial infidelities giving rise to suspicion, premeditated abortion, the *Casus Apostoli*, and spiritual relationship supervening after the marriage on the ground of sponsorship.

2. The *causes of divorce bona gratia* are : impotency anterior to the marriage and proved by an experience of three years, imprisonment of the partner, his secret flight, servitude, insanity, or complete imbecility, leprosy, religious profession, the husband's elevation to the episcopacy.

B. As regards PROTESTANTS ⁽²⁾ : most of them ⁽³⁾ admit as legitimate.

1. Cf. ZHISHMAN, o. c., p. 729-783 ; VERING, o. c., p. 941 s. ; WATKINS, o. c., p. 347-362. As regards the United Greeks : since the doctrine of the indissolubility of marriage *ratum et consummatum* is an article of faith, they must necessarily admit it equally with Roman Catholics. See above, n° 197 ; VERING, o. c., p. 943 ; SUARN, *Praxis missionarii in Oriente servata*, Parisiis, 1911, n° 162.

2. Cf. ROEDENBECK, o. c., p. 112 s. ; VERING, o. c., p. 943 s. ; OTT, o. c., p. 157 ss

3. What we have said has special reference to German and Swiss Protestants. In the Anglican church the dissolution of marriage by divorce *a vinculo* has not been expressly, and, so to speak, officially admitted. Even under the Act of 1857, which permits civil divorce on the ground of adultery, according to the resolutions passed in the *Lambeth Conference* of 1888 (GEARY, o. c., p. 579 ss.), and of 1908 (WILKINS, o. c., p. 164 ss.), the right of the guilty party to marry again, after a civil divorce has been obtained, is not recognised, since such a marriage is regarded as contrary to the divine law ; and, if the innocent party is not strictly forbidden to marry again, and the religious solemnization of such a marriage is not rigorously refused, such a refusal is nevertheless recommended. Cf. also WATKINS, o. c., p. 426-430, and compare with HOWARD, o. c., II, p. 71-85, and 102-112 ; GORE, o. c., p. 32 ss.

Indeed, the *Reformation of ecclesiastical laws*, issued in 1552 and offered for ecclesiastical sanction, set aside separation and admitted divorce for various causes ; as a matter of fact, before the Act of 1857, divorce *a vinculo* was occasionally granted in particular cases by means of a private parliamentary bill ; but the said reform never became a part of the ecclesiastical law, and the concessions had reference only to particular cases, and were granted outside the provisions of the law. Cf. *Encyclop. Britannica*, t. VIII, p. 338. s.

For the attitude of the various Protestant churches in the United States

causes of divorce: adultery, according to the wrong interpretation of Matth., XIX; culpable desertion of the partner, in accordance with the Pauline privilege misunderstood and amplified. Besides these, in different sects and countries, various other grounds of divorce have obtained recognition, such as attempt upon the partner's life, cruelty, drunkenness etc. Some authors, like EBELING, o. c., p. 41-48, admit and defend all these causes of divorce indiscriminately ⁽¹⁾; see also FAUREY, o. c., p. 117-123; HOWARD, o. c., II, p. 60 ss. Others are less broad in their views; thus ROEDENBECK, o. c., p. 112 s., maintains that *rightfully* divorce is only permissible in the case of adultery and in the *casus Apostoli*, understood in the Catholic sense, so that, according to him, the marriage of Christians is susceptible of dissolution only on the ground of adultery.

Scholion II. The advantages of Marriage.

202b.
The three advantages of marriage.

We have explained above, in section 3, that the essential and constituent elements of Christian marriage may be reduced to *three* points. The first *two* concern the *natural part that marriage plays*. They are the relation that it bears to the procreation and good education of children, and consequently the obligation to conjugal fidelity. The *third* point concerns marriage as a sacrament; that is the sacramental dignity together with the indissolubility of the marriage bond, which is sanctioned and established by the sacrament in a way that is altogether unique.

These three elements are called the *advantages of marriage*, in that they make lawful the conjugal union and act, which in their nature involve a certain imperfection ⁽²⁾.

a/ They make *marriage itself* lawful: from the *natural* point of view this is effected by the above mentioned relation to the prospective offspring, and also by the obligation of fidelity that flows therefrom. From the *super-natural* point of view, it is the result of the sacramental dignity accruing to it. b/ The *act* or *use of marriage* is justified and ennobled thereby, both in consequence of the end proposed, and the intention of the married par-

of America with regard to divorce, their legislation in this matter, and their attempts to restrict the frequency of divorce, cf. LICHTENBERGER, o. c., chap. VIII, p. 121 ss.

1. Luther himself admitted divorce in the case of the refusal of the marriage debt, looking upon such refusal as equivalent to wilful desertion. Cf. the famous sermon of 1522, in BOSSUET, *Histoire des variations des églises protestantes*, Paris, 1688, Livre VI, p. 299 ss.; HOWARD, o. c., p. 62 s.; GRISAR, *Luther*, II, p. 208 ss.

2. « In conjunctione viri et mulieris rationis jactura accidit, tum quia propter vehementiam delectationis absorbetur ratio, ut non possit aliquid intelligere in ipsa...; tum etiam propter tribulationem carnis, quam oportet tales sustinere ex solitudine temporalium ». S. THOMAS, *Suppl.*, qu. 49, art. 1.

ties, when keeping in view either the procreation of children or the fulfilment of their duty of fidelity to one another (¹).

Such is the meaning of the common formula: *the advantages of marriage are threefold: offspring* (or the good of the offspring), *fidelity* and the *sacrament*; the word *offspring* signifies the relation that marriage has to procreation, while the word *faith* or *fidelity* is to be taken in the sense of obligation to fidelity.

Besides these three, there are no other essential advantages of marriage. This follows from the considerations that have been developed above. Cf. BUCCERONI, in the *Anal. Eccles.*, 1901, p. 319 s. ST. THOMAS, *Supplem.* qu. 49, art. 3, shows which of these three fundamental advantages holds the first place.

SUPPLEMENT.

CIVIL DIVORCE.

PARAGRAPH I. HISTORICAL NOTICE.

I. DIVORCE IN ROMAN LAW (²).

According to ancient Roman Law, *marriage in manu* could not be dissolved by the *wife*, but only by the *husband*. It was lawful for the husband to annul the contract, in marriage by purchase and by use, on account of various charges against his wife, especially on account of adultery, drunkenness, and witchcraft. In marriage by *confarreatio* also the original indissolubility gave place in turn to divorce, for the same reasons, by means of *diffarreatio* (³).

203a.
Divorce in
Roman civil
Law.

The *formalities* to be observed in the dissolution of a marriage, except in the case of « *diffareatio* », consisted at first, but not under pain of nullity, in taking the opinion and *advice of friends*; later, under the

1. These two advantages, viz., the relation to procreation and the mutual obligation to fidelity may be regarded as they are *in habitu*, or as they are *in actuali intentione*. « *Secundum quod sunt in habitu, faciunt matrimonium honestum...*, *ita etiam secundum quod sunt in actuali intentione, faciunt actum matrimonii honestum* ». As regards the third advantage, the sacrament, « *non pertinet ad usum matrimonii, sed ad essentiam ipsius...*; unde facit ipsum matrimonium honestum, non autem actum ejus, ut per hoc actus ejus absque peccato reddatur ». ST. THOMAS, *Supplem.*, qu. 49, art. 5.

2. For the ancient customs and legal provisions of other nations, cf. VILLIEN, I. c., V^o *Divorce*, col. 1456 s.

3. Cf. Darenberg et Saggio, o. c., II, V^o *Divortium*, p. 321 ss.

Emperor Augustus, the Julian Law prescribed that the party seeking divorce should have the support of *seven witnesses* ; and that apparently was required for the validity of the act ; but no intervention of the public authority was required : the divorce was and remained an act of private right.

Marriage sine manu, already in vogue before the Christian era, was liable to dissolution by either of the parties. Its dissolubility by degrees so increased that it came to be dissolved not only by mutual consent, but even by the wish or mere whim of one of the parties. The law still required, in the latter case, the existence of a just cause juridically allowed ; but even if accomplished without cause, the divorce secured its effects, and, at most, was liable to certain penalties.

This licence communicated itself little by little to *marriage in manu*, so that, except, perhaps, in the case of marriage by *confarreatio*, persons were divorced as easily as they were married, and the number of divorces increased beyond measure. In the early days of the Republic, divorced persons were the exception ; but from the time of the Empire the evil spread in all directions, favoured by the corruption of morals. This historical fact is clearly established by documents and evidence quoted by CAMBIER, o. c., p. 44 ss. ; COULON, *Divorce*, p. 54 ss. ; GLASSON, o. c., p. 175 ss. ; LEFEBVRE, o. c., p. 133 ss. (1).

Later on the Christian emperors strove, as far as circumstances permitted, to revise the laws in accordance with the principles of the Church.

Constantine, in 331, restricted the number of legal causes for divorce. As against the wife, he admitted adultery, witchcraft, and what was called *officium conciliatricis* (huppelei) ; as against the husband, homicide, sorcery, and the violation of a burial-place. Anyone who repudiated his partner for other causes was liable to severe penalties, and could not remarry. In later times, however, popular feeling, opposed to these reforms, forced the hands of authority, especially of Theodosius II, who found himself compelled to sanction several new causes of repudiation, and to withdraw the absolute prohibition of re-marriage. Justinian established afresh stricter limits (2), and moreover, abrogated even divorce by mutual consent (3), except in the case of the religious profession of both parties ; but his successor did not maintain the latter law (4).

1. Everyone knows the stinging remark of Seneca regarding the Roman matrons « who counted their years by the number of their husbands ».

2. FAHRNER, o. c., p. 28 s. ; GEFFCKEN, o. c., p. 25 s. ; see also above n° 202a.

3. *Novella* 117, ch. 10.

4. Concerning the fate of divorce in the sequel, and the legislation of the Emperors of the East, see WATKINS, o. c., p. 350 ss.

II. DIVORCE IN ANCIENT GERMANIC LAW.

Notwithstanding the purity of morals of the ancient Germans, whose praises Tacitus speaks, authors are agreed in saying that they practised divorce. Among them the husband had the legal right to repudiate his wife, practically at will, on condition that he made her parents certain compensation ; on the other hand, a correlative right on the part of the wife was not recognised (1). This latitude allowed to the husband, and to the husband only, is easily understood if we bear in mind the mental attitude of this nation with regard to the nature of marriage, and to the authority of the husband over his wife.

From the Vth century onwards the Germans, living in the midst of Gallo-Roman races, whose territory they had invaded, began to draw up laws and codes concerning, at one time, their own people and the Gallo-Romans separately, at another, concerning the whole population without distinction. Thus the Visigoths and the Burgundians had their Roman law for their Roman subjects, along with their own Barbarian law (*Lex Barbara*) for the Germans only ; whereas the edict of Theodoric regulated at the same time the Ostrogoths and the Romans (2).

All these laws, even the Barbarian laws, clearly bear the stamp of the Christian religion as well as of Roman law ; they take into account chiefly the provisions of the code of Theodosius, adapted to the customs of the locality and to Catholic ideas. In particular with regard to *divorce* :

1. The *Roman laws*, enacted apparently (3) by the Burgundians and by the Visigoths (4), following the example of the Christian emperors, still permit divorce by *mutual consent* ; but as for divorce by *unilateral* option, whether on the part of the husband or on the part of the wife, they restrict it practically to the causes established by Constantine, and forbid re-marriage to any who repudiate their partners for any other reasons. Moreover, the law established by the Visigoths expressly enacts, under the influence of Christian ideas, that marriage cannot be dissolved in consequence of insanity (5).

2. The *Barbarian laws* bear still further traces of the efforts of the

1. The husband might commit adultery, provided it was not with a married woman, whereas the adultery of the wife was punished by an ignominious death.

2. VIOLLET, *Histoire*,... Livre I, 4^e Partie, may be consulted with profit on the subject of these Roman and Barbarian laws, their origin and their connection.

3. FAHRNER, O. C., p. 51 ; LÖNING, O. C., II, p. 613 s.

4. The Roman law of the Visigoths is generally called the *Breviarium Alarici*, because it is a recapitulation of the Theodosian code, published by Alaric II in the year 506.

5. FREISEN, O. C., p. 778.

203b.
*Divorce in
Ancient Ger-
manic Law.*

Church to render the civil law more and more conformable with the principle of indissolubility. Divorce by *mutual consent*, upheld seemingly in most of the codes of this period, is replaced in the law of the Visigoths, from the middle of the VIIth century, by the law of the Church, permitting separation on account of religious profession, the marriage tie remaining intact.

As for divorce by *unilateral* option, the Barbarian law of the Burgundians (Loi Gombette), dating from the end of the Vth century, commences, in accordance with Germanic custom, by forbidding the wife to abandon her husband, and that under pain of death by suffocation; it permits the husband to abandon his wife, but only for certain well defined causes, and on condition that compensation be made to the injured party. As in the Roman law, these causes are adultery, witchcraft, and the violation of a burial-place. Furthermore, a later enactment, made under the increasingly effective influence of the Church towards lessening the number of divorces, provides that the husband who repudiates his wife without legal cause, shall be compelled to quit his house and cede all his belongings to the repudiated wife and to her children. The Barbarian law of the *Visigoths*, in its original wording, admitted perhaps a greater number of causes for repudiation on the part of the husband; but the wording dating from the latter half of the VIIth century recognises only the case of the wife's adultery, and does not allow her to abandon her husband, unless he be guilty of sodomy, or wishes to expose her to prostitution; even then it forbids her to remarry before the death of her husband.

Such are the Barbarian laws which practically settle the question of divorce. As we have said, they are already impregnated by Christian ideas; nevertheless it is only from the VIIth or the VIIIth century that they are really moulded by the latter. As to the laws of other Germanic tribes, they deal little or not at all with divorce. Thus the Frankish legislation, the Salic and Ripuarian laws, do not mention it before the VIIth century. But it may be argued from various indications that the Franks, like the rest of the Germans, recognised divorce, both by mutual consent and by unilateral option, for determined causes (¹).

III. CIVIL DIVORCE FROM THE VIIIth CENTURY TO THE PRESENT DAY.

A. Before the French Revolution.

An energetic reaction against divorce took place during the rule of the *Carlovingians*, so that by the time of Charlemagne this abuse had

1. See the provisions of this ancient Germanic law developed in LÖNING, o. c., II, pp. 617-627; GEFFCKEN, o. c., pp. 32-52; FARNER, o. c., pp. 48-59; FREISEN, o. c., pp. 776-781.

203c.
Before the
French Revolution civil
divorce was
absolutely
prohibited.

entirely disappeared from legislation. It had not however, on that account, disappeared from custom, especially as several of the penitentials of the VIIth and VIIIth centuries were too much in its favour. But as matrimonial jurisdiction passed by degrees into the hands of ecclesiastical judges, customs were gradually reformed. In France as early as the XIth century, principles and conduct in this matter were in entire accord. The stages of this evolution may be followed in the excellent account given by FAHRNER, o. c., pp. 71-120 ; cf. GEFFKEN, o. c., p. 52-67.

The civil laws remained in agreement with Catholic doctrine down to the French Revolution, even after the State had begun to usurp the jurisdiction over, and to make regulations regarding marriage, as we shall show in n° 226. Even then it continued to safeguard thoroughly the bond of consummated marriage and permitted only separation from bed and board, in accordance with Canon law, excepting dissolution of non-consummated marriage in case of solemn religious profession (1).

B. Before the introduction of the Code Napoleon.

On the 20th of September 1792, under the aegis of the revolutionary Republic, the law of *divorce*, and at the same time civil marriage, (2) were introduced by the Legislative Assembly (3). According to the mind of the pseudo-legislators (4), the power of divorce was a consequence of the

Law of civil divorce introduced in France in 1792 ;

1. The *Pauline privilege* was not introduced into French law ; POTHIER, o. c., nos 500-505, cites an edict of Parliament, made Jan. 2, 1758, declaring there was no room for dissolution of marriage in a case under consideration, although in it the conditions of the privilege were verified.

2. We shall show later, on what grounds civil marriage was instituted, in consequence of the provision of the *Constitution* of 1791, tit. II, art. 7, which, after declaring that « *The law considers marriage simply as a civil contract* », decreed : « *The legislature will establish, for all inhabitants without distinction, the manner in which births, marriages and deaths shall be verified* ».

3. MARTIN, o. c., pp. 49-64, and CRUPPI, o. c., ch. 2, expose the artifices resorted to by the favourers of divorce to arouse public opinion, and to persuade the legislators to vote for the law. Their subversive theory already had precursors, whose names are given by RIBEROLLES, o. c., p. 8 s.

4. Objectively speaking, divorce is not of its own nature a logical consequence of the proclamation of civil marriage. Abstracting from the Sacrament, if we consider marriage merely as a natural and civil contract, governed solely by the civil authority, it does not lose its character of indissolubility, as we have seen above ; but the idea and the intention of the legislators were otherwise. Nevertheless there is a certain objective connection in the nature of things. The very idea of civil marriage weakened, to a perceptible degree, this notion of indissolubility. In this respect we may say with LEMAIRE, o. c., p. 159 s. : « *Civil marriage was the cause of the establishment of divorce in France, in this sense, that civil marriage, a weak conception, without the*

establishment of civil marriage ; in fact, considering marriage as a purely civil contract, they declared it voidable by nature, like other contracts. This is the opinion explicitly formulated by Leonard Robin, the promoter of the law ⁽¹⁾, and clearly expressed in the very text of the decree ⁽²⁾.

In the midst of popular distress and commotion, the law of divorce passed without any opposition, and it was drawn up in terms so wide that they authorised the breaking of the contract, not only for a multitude of special causes ⁽³⁾, but also by mutual consent ⁽⁴⁾, and even by the will of one of the parties, « on the simple allegation of incompatibility of temper or character » ⁽⁵⁾. Moreover, art. 7 declared : « For the future no corporal separation can be granted ; married persons cannot be disunited except by divorce » ⁽⁶⁾.

and success-
ively ampli-
fied.

This is not all ; however wide the breach was already, it was soon widened still more, and the necessary formalities were still further simplified

power of resistance, took the place of religious marriage, a strong conception, which would have assured victory... The religious conception of marriage, solidly enshrined in an honoured and legal religious marriage, that is what was wanted ; that is what we ought to have been able to oppose to divorce ; that is the only remedy that could have saved us from its institution as a general law and from its daily more rapid acclimatisation in our midst ».

We may add to these words the remark of LAURENT, *Avant-Projet*, t. II, p. 2 : « I do not say that one cannot, without being a Catholic, maintain the indissolubility of marriage ; nevertheless, it is certain that the religious idea plays a leading part in this discussion ». Cf. also LICHTENBERGER, o. c., p. 62 s.

1. Cf. LEMAIRE, o. c., p. 104.

2. *Ibid.*, p. 103, where the author remarks that many speakers condemned as useless the decree permitting divorce, because, they said, the principle was already contained in the very proclamation of civil marriage. Among others, Gaudet exclaimed : « I am opposed to it (i. e. to the declaration of the principle of divorce in the law) *because it is there already* ».

3. Art. 4, par. 1 : « Each of the parties can equally secure pronouncement of divorce for determined reasons, viz. 1. lunacy, insanity, or mania of one of the parties ; 2. sentence to punishment affecting the person or honour of one or other ; 3. crimes, cruelty, or grievous injury of one against the other ; 4. notorious immorality ; 5. desertion of the wife by the husband or of the husband by the wife for two years at least ; 7. emigration in cases provided for in the law, especially by the decree of April 8th, 1792 ». COULON, *Div. et sép.*, p. 240.

4. Art. 2 : « Divorce takes place by the mutual consent of the parties ».

5. Art. 3.

6. See COULON, o. c., p. 174-179, on the formalities then required to obtain a divorce, and on the legal effects of the latter. Notice that the divorced parties were free to renew their marriage. Cf. DUMAS, o. c., p. 61 ss.

by the decrees of Dec. 28, 1793 (8 Nivôse, an II), April 23-28, 1794, and Oct. 15, 1794 (4-9 Floréal, an II, and 24 Vendémiaire, an III) (1).

But in 1795 began a *reaction* against the abuses of divorce (2). On the 2nd of August of that year (15 Thermidor, an III), the last-mentioned decrees were abrogated, and only the law of 1792 remained provisionally in force. Even this was slightly modified by the law of Sept. 17, 1797, particularly with regard to the formalities required to obtain a divorce « for incompatibility of temper » (3). Nevertheless the evil was only to some extent checked (4).

C. From the drawing up of the Code Napoleon to the separation of Belgium from France (1814-1815).

Divorce, as well as civil marriage, was admitted in the *Civil Code*, promulgated March 21, 1804, and designated under the title of the Code Napoleon, from Sept. 3, 1807. Nevertheless, it was recognised, not as a logical consequence of the idea of civil marriage (5), but as a sanction of

204.
Sanctioned
but limited
by the Civil
Code,

1. COULON, o. c., p. 180 s., cf. text quoted p. 250 s. See also GLASSON, o. c., p. 200 s.; DUMAS, o. c., p. 63 ss.; RIBEROLLES, o. c., p. 30 ss.

2. According to GLASSON, o. c., p. 261, « In Paris, during the 21 months that followed the promulgation of the law of 1792, the courts pronounced 5994 divorces. In the first three months of 1793 the number of divorces equalled that of marriages ». Consult, however, MARTIN, o. c., p. 157 s. This enormous number disturbed many people : « The law of divorce, said Mailbe, is a gambling tariff rather than a law. At the present moment marriage is merely a matter of speculation. A wife is taken like a parcel of goods, with an eye to the profits that may accrue ; and she is got rid of when she ceases to be profitable ». Delleville adds : « We must stop this marketing in human flesh, which the abuse of divorce has introduced into society. We must hasten to remove the monstrous proviso that permits incompatibility of temper to be alleged ». COULON, o. c., p. 183 s. Cf. COMBIER, o. c., p. 445 s.; JOLY, *La Crise du Mariage*, l. c., p. 127.

3. Cf. COULON, o. c., pp. 182-188. As often as divorce is demanded on this ground, « the civil officer shall be able to pronounce a divorce only after six months from the date of the last of the three acts of non-conciliation required by articles 8, 10 and 11 of the law of Sept. 28, 1792 ». Portalis had demanded in vain the abrogation of the plea of incompatibility of temper, as RIBEROLLES notes, o. c., p. 45 s.

4. GLASSON, o. c., p. 261 : « In spite of the reaction of an III, the abuse continued. In the single month of Pluviose, an III, there were (in Paris) 223 divorces, of which 205 were demanded by wives for incompatibility of temper ».

5. On the contrary the legislator recognised that civil marriage, of its own nature, required the perpetuity and indissolubility of the marriage bond. Thus *Savoie-Rollin*, in his report made to the court in the session of 27 Ventôse, an XI, proclaims that « the purpose of marriage is that it should be perpetual », that

liberty of worship (¹), and principally as a necessary *remedy* for escaping still greater evils (²). This is why, as we shall see presently, the authors of the Code sought to diminish the number of causes for divorce, and to increase the formalities to be observed, in order to avoid abuses (³). Still they declared the rupture perpetual once it was accomplished, and thereby deprived the divorced parties of the means of resuming conjugal relations.

Meanwhile, out of regard for Catholics (⁴), they sanctioned *separation*

« this is a principle universally recognised ». LOCRÉ, o. c., V, p. 317. In the same way *Gillet*, orateur du tribunal, at the session of the Corps Législatif, 30 Ventôse, an XI, declares : « Permanence is its state, perpetuity its vow, indissolubility between the parties its natural condition ». LOCRÉ, l. c., p. 378. TREILHARD also in his *Exposé des motifs* says : « It is a point equally incontestable, that of all contracts there is not one in which the intention and the vow of perpetuity on the part of the contractors is more to be desired ». LOCRÉ, l. c., p. 291.

1. « The question of divorce ought to be so decided as not to burden any conscience, or to fetter any liberty », so that no one ought to have recourse to it against his religion, and that no one ought to be excluded from it, if his religion permits it. *Treilhard* (LOCÉ, l. c., p. 291). Portalis speaks in the same way (LOCÉ, o. c., p. 49 and 139).

2. « Divorce itself cannot be a good ; it is the remedy of an evil ». These too are the words of *Treilhard* (LOCÉ, o. c., p. 292), when denouncing the passions and the corruption of morals that require the dissolubility of marriage, in cases where no other remedy is available. He himself recognises that divorce ought to be done away with, if the problem were susceptible of any other solution ; that is to say, if « we could find the means of so perfectly arranging conjugal unions, of so strongly inspiring the parties with the sense and the love of their respective duties, that we might flatter ourselves that they would not subsequently withdraw from them, and that they would no longer compel us to be witnesses of those atrocious scenes, those revolting scandals which so imperatively require the separation of the parties ». Not seeing any other way of escape, he at first came to the conclusion that either divorce or separation is a necessity ; afterwards, seeing the insufficiency of the latter, he admitted the necessity of divorce. See also what he says at the end of his *Exposé des motifs*, as well as the discourse of *Gillet*, l. c., p. 378.

3. *Treilhard* (LOCÉ, o. c., p. 297) : « The formalities, the proofs with which divorce will be surrounded, may prevent abuse : let us hope the number of divorced persons will not be great ».

4. After attempting to prove the necessity of divorce, *Treilhard* continues in these terms (LOCÉ, o. c., p. 298) : « The social pact guarantees to all French people the liberty of their belief. Tender consciences may regard the indissolubility of marriage as an imperative precept. If divorce were the only remedy offered to unhappy spouses, would not citizens be faced with the cruel alternative, either of being false to their belief, or of sinking under a yoke that they

side by side with divorce, although this had not been inserted in the provisional text of the law ⁽¹⁾.

As to the legal causes for divorce and separation :

1. The civil Code permitted *divorce* : a/ For *determined* reasons, viz. for adultery of the wife, or even of the husband, if he claimed to keep his concubine under the same roof as his wife (art. 229 and 230) ; also for excesses, cruelty or grievous injuries (art. 231) ; and for condemnation to a penalty involving disgrace (art. 232).

b/ *By mutual consent*. Far from understanding this consent in the sense of the law of 1792, for which incompatibility of temper sufficed, or in the sense of an agreement based on the mere fancy of the parties ⁽²⁾, it exacted, on the contrary, a mutual, lasting expression of will, so expressed, and fulfilling so many conditions and formalities, that it constituted a necessary *presumption (juris et de jure)* of the existence of a major yet secret motive for separation, and one that ought to remain secret. This is clearly insinuated by art. 223 ⁽³⁾.

can no longer bear ?... While permitting divorce, the law leaves separation still available. The party that has the right to complain may formulate either demand at choice ; thus no man's opinion is shackled, and full liberty in this respect is maintained ». See also the words of Portalis (LOCRÉ, o. c., p. 132 and 139).

1. COULON, o. c., p. 191 and 192 : « The system adopted by the commission (charged with the preparation of the projected law) did not re-establish separation. The discussion ended in a compromise between the two opinions », of which one was in favour only of divorce, and the other in favour only of separation.

2. Already in 1796, before the Legislative Assembly, *Regnault* had severely censured the laxity of the law of 1792 : « What is there more immoral than to permit a man to change his wife as he changes his coat, and a wife to change her husband as she changes her hat ? Is not this an attack on the dignity of marriage ? Does not this make marriage the mere plaything of caprice and levity, and change it into a successive concubinage ? »—*Treilhard* (LOCRÉ, o. c., p. 29 s.) equally condemns divorce by mere mutual consent, and avows that, though the will of the contracting parties sufficed to contract the marriage, it does not suffice to dissolve it, as if there were question of a contract in which only the parties themselves are interested : « Marriage is not solely in the interest of the persons who contract it. It forms a bond between two families, and it creates in society a new family, that may itself become the parent-stock of many other families. The citizen who marries becomes a husband ; he will become a father. It is thus that new relationships are established which the parties are not free to break at will ».

3. « The mutual and persevering consent of the parties, expressed in the manner prescribed by the law, under the conditions and after the proofs that it

c/ *In the case of art. 310* : « When the separation, pronounced for any other reason except the adultery of the wife, has lasted more than three months, the party that was originally the defendant may claim a divorce from the court, which will grant it, if the original plaintiff, present or duly summoned, does not consent to put an end to the separation » ⁽¹⁾.

2. *Separation*, by virtue of art. 306, might be obtained « in cases in which divorce *for determined causes* is permitted », consequently only for the causes described under letter a/, mutual consent being excluded.

D. After the separation of Belgium from France.

1. In France.

205.
Abrogated
in France in
1816, divorce
was reintro-
duced in 1884.

Shortly after the happy re-establishment of the monarchy, i. e. in the year 1816, the law of divorce was abrogated by an almost unanimous vote, and its abrogation proclaimed on the 8th of May ⁽²⁾. This state of things remained till 1884, in spite of the repeated efforts of the advocates of divorce. Several times they succeeded in getting the Chambers to adopt a project favouring their views, but each time the Senate rejected it. See COULON, o. c., p. 229 ss.

But in 1884, thanks mainly to *Naquet*, divorce was *legally sanctioned anew* by the law of the 27th of July, and afterwards slightly modified by that of the 20th of April 1886. See COULON, o. c., p. 275 ss.; cf. p. 235 ss. ⁽³⁾ ;

determines, will prove sufficiently that life in common is unbearable to them, and that there exists in their regard a peremptory cause for divorce ». See also the words of *Treilhard* (LOCRÉ, o. c., 300 s.), as well as those of Napoleon (p. 69) : « Mutual consent is not the cause of divorce, but a sign that divorce has become necessary ».

1. « It would not be just that the party who has chosen the way of separation, as more conformable with his or her belief, should keep the other party, whose belief may not be the same, under a perpetual disability to contract a fresh marriage. The liberty, which the Constitution guarantees to all, would then be violated in the person of one of the parties. It was necessary therefore to authorize the latter, after a certain interval, to claim that the separation should be converted into a divorce, if the party who had caused the separation to be pronounced, did not consent to put an end to it. Thus two interests equally sacred have been, as far as possible, reconciled, the security of the parties on the one hand, and religious liberty on the other. » *Treilhard* (LOCRÉ, o. c., p. 298 s.).

2. Cf. LAURENT, *Avant-Projet*, II, p. 7 ss. ; LOCRÉ, o. c., p. 240 ss.

3. The law of 1884 no longer permits divorce by mutual consent. The adultery of the husband, even without concubinage, becomes an additional cause of rupture. By virtue of art. 295, the separated parties are not prohibited, except in one instance, from re-establishing their union. Art. 310 is so modified that, after three years of separation, divorce *may* (not must) be substituted for it, whereas the Civil Code declared the sentence of dissolution absolute at the demand of

the original provision of art. 306 concerning *separation* was retained⁽¹⁾.

Since then, the abuse of divorce has increased day by day⁽²⁾, and with it the tendency to widen more and more the legal way to it⁽³⁾. There is, however, nothing astonishing in this, since both the jurisprudence⁽⁴⁾ and the lawmakers⁽⁵⁾ favour the movement.

the culpable party. With regard to the law of 1886 we may note that, after the sentence of the judge, the divorce need no longer be pronounced by the officier de l'état civil, but simply inscribed in the register. RIBEROLLES, o. c., pp. 81-100, gives the history of the whole question from the point of view of French legislation, from 1816 to 1886. Cf. also PLANIOL, o. c., I, nos 1229, 1231 and 1263; ALLÈGRE, o. c., I, p. 187 ss.; and infra, no 207.

1. The Code Napoleon sanctioned separation as taking the place of divorce in the case of Catholics; but the law Naquet considers it rather as a step towards divorce, a sort of intermediary stage, a period of trial more easy to obtain. In that case, it would be necessary to interpret art. 306 of the French Code in the sense that separation and divorce are to be granted for reasons of the same kind, but of less gravity in case of separation. Similarly art. 310 would now signify, in view of the law of 1884, that the judge may convert or not, separation into divorce, according as the causes that have brought about the separation, appear to him sufficient or not to authorise the dissolution. That this is the spirit of the law Naquet, ZARZYCHI, o. c., pp. 19-97, strives by every means to demonstrate. See PLANIOL, o. c., no 1299; also *Annales Parlementaires* (Belges) — Sénat (Séance du 15 Mars 1911), p. 227 s.

During the preparation of the Code Napoleon, some jurists, like Boulay, proposed to establish an analogous relation between separation and divorce. Cf. ZARZYCHI, o. c., p. 15 ss.; DUMAS, o. c., p. 62 ss.

2. LEMAIRE, o. c., p. 62 ss.

3. See what we said above, in no 180, of the efforts made by the abettors of divorce, such as Naquet and the brothers Marguerite, to smooth and widen as much as possible the path to divorce. Coulon also in his brochure, *Le divorce par consentement mutuel*, proposes to extend the law, but in a more moderate way; he still demands the insertion of certain determined causes, as well as divorce by mutual consent, as understood in the Civil Code. Cf. RIBEROLLES, o. c., p. 141 s.

4. LEMAIRE, o. c., p. 173 ss., shows that French jurisprudence has given to the allegation of *injury* a gradually widened interpretation, so that a means has been thereby provided for evading the law prohibiting divorce by mutual consent. Cf. also RIBEROLLES, o. c., pp. 118-122; LOSLEVER, o. c., p. 192 s.

5. Quite recently, June 6th 1908, both Chambers adopted the modification of art. 310 in the original sense of the Civil Code: « When the separation has lasted three years, the judgment will be converted by *right* into a judgment for divorce, at the formal request of one of the parties ». They rejected the restriction proposed by Méline: « If the demand emanates from the party to whose exclusive prejudice the separation was pronounced, or, if there exist one or

*Belgium had
divorce under
French and
Dutch rule,
and still
retains it.*

2. In Belgium.

The Code Napoleon was in force in our country up to the time when Dutch rule introduced a new legislation for the Federated Kingdom. In the drawing up of the new Code, the deputies, even the Belgians, voted by a large majority ⁽¹⁾ for divorce.

After the separation of the two countries and the recovery of Belgian independence, the Code Napoleon was reintroduced into Belgium, with all its provisions concerning divorce. These provisions, with the exception of certain changes of very small importance ⁽²⁾, remained intact until, quite recently, the law of Feb. 8th 1906 removed the prohibition inserted in art. 295, by virtue of which divorced persons could not be reconciled nor re-establish conjugal life. Certain modifications had in the meantime been introduced by the law of Feb. 11th 1905, in the matter of the formalities to be observed ; as we shall explain presently ⁽³⁾.

Note. The Hague Conference has published various statutes regulating the application of the laws of separation and divorce, with regard to marriages contracted in other countries. A short account of these will be found in the *Archiv. f. kat. Kirch.*, 1906, tom. 86, p. 476 ss., and in BOUSCHOLTE, o. c., pp. 14-17.

The general principle is this : parties living in other countries cannot obtain divorce or separation except in the cases provided for by the law of their own country, and by that of the country in which they reside.

Scholion. Laws in force in other countries.

206.
*Laws in
force in other
countries.*

1. There are several countries where the law does not permit divorce, but only separation. The principal of these are, in Europe : Spain, Portugal, Italy ⁽⁴⁾, Poland and Monaco ; and in America : Ar-

more children as the issue of the marriage, the court may refuse the conversion ». Cf. BESSE, o. c., p. 341 s. ; he states also other modifications introduced in favour of divorce, especially by the law of Dec. 15th 1904, and July 13th 1907.

1. « After a discussion which was neither long nor noteworthy, the projected law of divorce was adopted by 62 votes against 18. The opponents were nearly all Belgians ; nevertheless, the majority of the Belgian deputies voted for divorce ». LAURENT, *Avant-Projet*, II, p. 15.

2. Art. 291 and 308 s. in SERVAIS and MECHELYNCK, *Les Codes* 1907.

3. See *Coll. Brug.*, t. XI, pp. 318-326. In these pages we explain the important motion put down by Alex. Braun, and, on 16 March, 1911, already approved of in a great part by the Belgian Senate, of which we shall have to speak later ; it concerns « modification of the law of corporal separation ».

4. Some years ago, in Italy, the enemies of the Church tried to introduce a law in favour of divorce ; but Leo XIII made an eloquent protest, in his Allocu-

gentina, Brazil, Chile, Mexico, Peru, Uruguay, and South Carolina (¹).

2. In other countries divorce alone exists, and separation is not permitted, except as a preparatory stage, in view of divorce (²). This is the case in Switzerland, Roumania, Servia, Denmark, Norway and Sweden, and in the greater part of the United States of North America (³).

3. The laws of still other countries permit both divorce and separation. Among them, those of France, Belgium, Germany and England (HOWARD, o. c., II, p. 107 ss.) and of some States of North America (⁴).

4. Lastly, there are countries where the law differs according to the religion of the parties. Thus in *Austria*, separation only is accessible to Catholics, even in the case of a mixed marriage; whereas non-Catholics have divorce, and Jews are allowed even greater latitude than Christians (⁵). In *Russia* civil marriage does not exist, and it is only the religion of the parties that governs their marriage. In that country, therefore, Catholics have not the right of divorce; on the other hand, the Orthodox and the Jews possess that right.

With regard to the clauses and *ulterior provisions* of all these laws, we may limit ourselves to a few remarks. In *Germany* mutual consent is not admitted among causes for divorce (art. 1564), but separation may always be converted into dissolution at the request of one of the parties (art. 1576). In *England* adultery only is recognised as a legal cause; and the adultery of the husband must be qualified, that is to say, it must be accompanied by rape, incest or bigamy, or sin against nature, or cruelty, or desertion of two years' duration (to which desertion is assimilated the fact of not obeying a decree for the restitution of the conjugal rights) (⁶): this is intended to hinder the multiplication of divorces. In *Scotland* we come across a peculiar custom, not sanctioned by the law, but, as it were, existing on the

tion of the 18th of Dec. 1901 (*Coll. Brug.*, t. VII, p. 169 s.), and an energetic popular movement joined its voice with his; so that, at the beginning of 1904, this proposition disappeared from the list of projected laws. Cf. *Etudes religieuses*, 1902, tom. XCI, p. 340 ss.; CASTLEIN, o. c., p. 557 s.; see also LAURENT, *Avant-Projet*, II, p. 2 ss., who records a previous similar attempt, dating from 1881, in the Italian peninsula. See also the Instructions of Card. Parrochi to the Italian Bishops (24 Dec. 1901), against the motion of the law in *N. R. th.*, p. 1902, p. 307 ss.

1. SCHULZE, *Eherecht*..., I. c., p. 765.

2. See LEHR, o. c., nos 943 ss., 987 and 1069; cf. G. LAURENT, *La Répudiation*, p. 115 ss.; and 132 ss.

3. SCHULZE, *Eherecht*..., I. c., p. 764.

4. *Ibid.*

5. G. LAURENT, *Répud.*, p. 128 ss.; *Le Régime des Cultes*, p. 110 s.

6. Cf. *Envelop. Britannica*, VIII, p. 339-341.

borders of the law : the parties may separate by private consent, without the intervention of a magistrate ⁽¹⁾. Finally, in several of the *United States* of North America, the causes of dissolution are manifold, and some are specified in a manner so vague, v.g. drunkenness and violence of character, that they lend themselves to a very wide interpretation in practice ⁽²⁾.

For further details see LEHR, o. c.

PARAGRAPH II. PROVISIONS OF THE BELGIAN CIVIL CODE.

207.

Provisions of
the Belgian
Civil Code :

I. DIVORCE.

A. Causes.

1. concerning
divorce :
as to its
causes,

1. *Mutual consent*, formulated in such a way as to furnish in the eyes of the law the presumption of a secret but grave cause for dissolution. Art. 233.

2. *Determined causes* ⁽³⁾ :

a/ Adultery of the wife ; adultery of the husband, provided he has kept his concubine in the same house as his wife ⁽⁴⁾. Art. 229 and 230.

b/ Violence ⁽⁵⁾, cruelty ⁽⁶⁾, and grievous injury of one party towards the other ⁽⁷⁾ ; art 231.

1. LAURENT, o. c., p. 98.

2. SCHULZE, l. c.

3. PLANIOL, o. c., I, nos 1148 and 1149, gives a synoptic scheme of the causes admitted by various legislations, calling attention to the fact that the German Code and the Code Napoleon are based on different principles. Cf. also CRÉTINON, l. c., p. 167 s.

4. As we have seen, the French law of 1884 does not require that the husband should keep his concubine in the same house as his wife. In Belgium, however, simple adultery on the part of the husband, without concubinage, suffices also for divorce, inasmuch as it may be considered to constitute a grave injury to the wife. See below, and cf. *Répertoire décennal*, 1890-1900, under *Divorce*, n. 15 s.

5. « By violence the law understands attacks upon life or endangering life ». AUBRY et RAU, o. c., p. 175.

6. By *cruelty* is understood « assaults that have not this character, (viz. of violence), and, in general, every kind of ill-treatment ». *Ibid.* See the singular decision of 19 Feb. 1908, *Pasicrisie*, 1908, II, p. 282.

7. « *Injuries* are verbal or real. *Verbal injuries* comprise insulting remarks, words of contempt, and calumnious or defamatory imputations *Real injuries* comprise all acts which constitute an insult, an outrage, or a mark of contempt ». *Ibid.*, p. 176.

Jurisprudence is giving an ever widening extension to this cause for divorce ; as may be seen in the *Répertoire*, l. c., nos 28-87, where the different judicial decisions are recorded. Thus it admits that the adultery of the husband, without concubinage, may constitute a grave injury to the wife, as also the

c/ The condemnation of one of the parties to a *degrading punishment* (*peine infamante*)⁽¹⁾. Art. 232.

d/ The case of art. 310, already mentioned. The partner against whom the other party has obtained a separation, for any other reason except the adultery of the wife, may after the lapse of three years, demand divorce from the Court, which will grant it, if the original complainant, present or duly summoned, does not consent immediately to put a stop to the separation⁽²⁾.

unlawful refusal of the conjugal duty; also a criminal conviction or a merely correctional punishment, according to the nature of the facts on which the verdict was based. *Pasicrisie*, 1907, II, p. 239; 1911, II, p. 90 s., comp. however with *Pasicrisie*, 1908, II, p. 281 s. See also PAOLI, o. c., p. 163; GLASSON, o. c., p. 272; BASDEVANT, o. c., p. 215; PLANIOL, o. c., I, n. 1156 (cf. nos 1150, 1158 and 1169 s.); AUBRY et RAU, l. c., p. 172; *Archiv. f. k. K.*, 1909, p. 253 s. It includes also the refusal of one of the parties to be married with the rites of the Church, after the respective party has promised to be so married (*Pasicrisie*, 1910, IV, p. 125 s.); abandonment of the home, at least in certain contingencies (*Pasicrisie*, 1908, II, p. 308 s.; 1910, II, p. 302 ss.); the fact of suspicious visits paid by the wife to another man (*Pasicrisie*, 1912, II, p. 150 s.); onanism on the part of the husband unknown to, or against the will of the wife (*Pasicrisie*, 1900, IV, p. 59 s.; 1908, II, p. 308 s.); the transmission of a venereal complaint (*Pasicrisie*, 1909, IV, p. 37 s.). See also *Pasicrisie*, 1909, II, p. 153 s. According to the Cour de Liège, « excessive drinking on the part of the wife, brought about by the kind of living adopted by the wife without opposition from her husband, and not degenerating into a scandal, or into inveterate intemperance, does not constitute a grievous injury sufficient for divorce; nor do insulting remarks provoked by the husband's wrongdoing » (Arrêt du 28 Juillet 1909, *Pasicrisie* II, 399). The mere refusal of the husband to comply with his conjugal duty, (*Pasicrisie*, 1909, III, p. 396 s. with the references quoted), or to re-admit his wife into the house, is no longer a sufficient cause (*Pasicr.*, 1909, II, p. 140 s.).

1. Cf. PLANIOL, o. c., I, nos 1171-1175. LAURENT, *Avant-Projet*, II, p. 20 s., explains what was formerly understood by this term; he adds that punishments legally branding with infamy have been abolished as such in Belgium by the new penal code of 1867 (art. 7). Hence it is controverted whether the provision of art. 232 has to be taken into account at the present day; in other words, whether condemnation to a penalty formerly branding a person with infamy before the law, constitutes at the present day, on this ground, a cause for divorce. As we have stated, the jurisprudence would regard it in any case as a cause for divorce, by reason of the injury it inflicts on the other party. Laurent proposes the suppression of this article. For the jurisprudence, see *Répertoire*, l. c., nos 80-87.

2. The jurisprudence is not uniform in the application of art. 310 to the case in which the party, who refuses cohabitation, does so legitimately, v. g. because

formalities,

B. Formalities.

The very complicated formalities to be observed in order to obtain a divorce by *mutual consent* are described in art. 275-294; those which relate to divorce for a *determined cause*, are enumerated in art. 234-274, modified by the law of 12 Feb. 1905⁽¹⁾.

Once the formalities have been complied with, if the judge considers that the parties fulfil the conditions required by the law, he does not himself pronounce the divorce, but he authorises the applicant to present himself before the civil officer in order to get it pronounced. Art. 258 and 264⁽²⁾.

effects;

C. Effects.

1. *General effects.* a/ The bond of civil marriage once dissolved, the parties may lawfully remarry; they may also, by virtue of art. 295, happily modified by the law of 1906⁽³⁾, come together again, by having their marriage re-celebrated. b/ Mutual conjugal obligations and rights cease. c/ The power of the husband over the goods and the person of his wife also ceases; and she thereby recovers her full legal capacity⁽⁴⁾.

2. *Special effects.* a/ If the divorce was pronounced for a *determined cause*, the wife may remarry after 10 months (a. 296)⁽⁵⁾; the husband guilty of

living together is morally intolerable. Cf. *Répertoire*, l. c., nos 91, 93, 95, 97 and 101; *Pasicrisie*, 1910, III, 57. See also *Annales Parlementaires* (Belges) — Senate, Session of 16 March 1911, p. 238.

1. SERVAIS et MECHELYNCK, *Les Codes*, 1907; SOUDAN, *Revue catholique de droit*, 1906, p. 195 s.; KNOCH, *Rev. eccles. de Liège*, 1905-1906, p. 318-323.

The procedure in case of a divorce for a determined cause, although simpler than in the case of divorce by mutual consent, is nevertheless much more complicated than the ordinary procedure.

2. In France, since the law of 1886, divorce is no longer pronounced by the civil officer, as we have already noticed; after the sentence of the judge, the entry in the civil register is sufficient. Note, however, that it is not the judge, strictly speaking, who pronounces the divorce although the text of the law seems to say so; he declares rather, as in Belgium, that there is a cause for divorce; the latter is accomplished only by the entering in the register, and it is only then that it commences to produce its effects. Cf. PLANIOL, o. c., I, nos 1229, 1230 and 1231. In the last of these passages the author says: « It is from this (the inscription in the register), and not from the sentence of the judge, that the divorce results; it takes effect at the registry office (*mairie*), not at the court ».

3. See *Coll. Brug.*, t. XI, p. 318 s.; KNOCH, l. c., 1906-1907, p. 330 s.

4. The various legal disabilities that the wife contracts according to art. 215 ss. have, therefore been, removed.

5. See, however, note on b/. The purpose and import of this enactment are explained in CASTAN, o. c., p. 31 s.; he notes also the changes introduced on this point by the French law of the 13th of July 1907: the legal delay need not be

adultery may not marry his accomplice (a. 298) ⁽¹⁾ ; « the party against whom the divorce has been granted will lose all the advantages that the other party has conferred on him, either by the marriage contract or since the marriage (a. 299), whereas the other party who has obtained the divorce will retain all the advantages conferred by the other party » ⁽²⁾ art. 300. b/ If the divorce was brought about by *mutual consent*, neither of the parties may contract a fresh marriage until three years after the pronouncement of the divorce (a. 297) ⁽³⁾, and full right of ownership over half of the property of each of them accrues to the children born of their marriage (a. 305) ⁽⁴⁾.

II. CORPORAL SEPARATION.

A. Causes.

« In cases in which divorce may be demanded for *determined causes*, the parties will be free to demand separation » (art. 306) ; « it cannot take place by *mutual consent* » of the parties (art. 307).

208.

2. concerning separation.

B. Formalities.

An action for corporal separation « will be brought, investigated, and observed when a separation of three years has already preceded, and when the inscription of the divorce has been made 300 days after the first judgment on the matter.

1. Cf. *Rev. ecclés. de Liège*, 1905-1906, p. 334 ; CASTAN, O. C., p. 28 s. ; in France the law of the 15th of Dec. 1904 has removed this prohibition. A bill with the same purport was laid before the Belgian Senate, but it was rejected. See *Annales Parlementaires*, 1909-1910, Sénat, 22 et 23 Fév. 1910.

2. It would be unjust to apply to the case of art. 310 those provisions that favour the party who has obtained divorce to the detriment of the other party ; this would be giving a legal advantage to the party who is in the wrong, and who, after three years, demands and obtains a divorce, although the sentence of separation was previously pronounced against him. The purpose of the law also is opposed to this ; for, if the law permits the conversion of separation into divorce, this is not directed against the party who refuses to cohabit, but simply secures that the other party shall not be kept in compulsory celibacy. Jurisprudence, moreover, is here in accord with equity. *Répertoire*, I. c., nos 94, 99, and 102.

3. The divorced parties who, in accordance with the terms of art. 295, reunite, causing their marriage to be celebrated anew, are not bound « to observe the delay of three years fixed by art. 297, nor even the delay fixed by art. 228 and 296, if the woman has not contracted in the meantime another marriage, of which the dissolution dates back at least ten months ». Art. 295, amended by the law of the 8 Feb. 1906.

4. According to the terms of art. 272, « the action for divorce is cancelled by the reconciliation of the partners ». For the interpretation of this article and of article 273, see the judgment of the supreme Court (Cour de Cassation), 14 Dec. 1910 (*Pasicrisie*, 1912, I, p. 38 ss.).

judged in the same manner as any other civil action (art. 307 ; cf. art. 875-881 of the *Code de Procédure civile*). It follows that separation, unlike divorce, has to be pronounced by the judge and not by the civil officer ; but a judicial sentence is absolutely necessary, and a separation made by mutual consent of the parties is null and void in law.

C. Effects.

1. The marriage continues to exist before the law, and consequently any fresh union is forbidden ; even separated partners are bound by their conjugal obligations (assistance, fidelity etc.), excepting cohabitation and community of goods (art. 311).

2. The wife does not recover her full legal capacity of which her marriage had deprived her, according to the provisions of art. 215 ss. See art. 1449.

3. The party against whom the separation was obtained does not incur the forfeiture specified in art. 299 ss. (1).

Note. a/ As to the condition of the *children* in case of divorce or corporal separation, see COURRÉGÉ, o. c.

b/ When separation has been granted, there is, apparently, still room for a petition for divorce, even without alleging a fresh cause. See *Revue de Droit Belge*, in *Pasicrisie*, 1912, II, p. 150 s.

PARAGRAPH III. CRITICISM OF THE LAW OF CIVIL DIVORCE AND CORPORAL SEPARATION.

209.

Law of civil divorce and separation iniquitous a) considered in general.

I. IN GENERAL.

The civil law permitting divorce is iniquitous, and merits the severest condemnation :

1. *In itself.* a/ It constitutes a sacrilegious usurpation. In fact it arrogates to itself the right of governing Christian marriage, a matter which belongs to the exclusive jurisdiction of the Church, as we shall show later ; whereas the secular authority has the right only of giving statutory effects to the marriage. This applies not only to divorce, but also to the law permitting separation.

b/ Moreover, admitting hypothetically the right of the secular authority over these marriages, analogous to the right which the civil authority has over the marriages of infidels, the iniquity of the law of divorce is not less

1. For the Belgian jurisprudence, cf. *Pasicrisie*, 1867, II, p. 400 s. ; arrêt de la Cour de Liège, 24 Fév. 1897, which reads : « since the decisions of our Court of Cassation, 29th of May, 1847 (*Pasicrisie*, 1848, I, p. 7) and 24th of March, 1865, jurisprudence is settled in this sense in Belgium ». Jurisprudence in France has adopted a different interpretation since the year 1845. Cf. AUBRY et RAU, o. c., V, p. 206 s., with note ; PLANIOL, o. c., I, n. 1332 ; *Annales Parlementaires* (Belges)-Sénat, (15 Mars 1911), p. 221 s.

patent, since it conflicts with the sacred principle of the indissolubility of marriage.

It cannot be denied that the matrimonial contract, whatever be the authority that governs it, is a contract of a special kind, indissoluble by nature, as we have proved in n° 180, and as even the authors of the civil Code recognised (1). The secular authority, therefore, even supposing it competent, has to reckon with the natural and the divine law, which sanction this indissolubility (2).

Let it not be said that the law of divorce leaves intact the marriage bond, and that it concerns itself only with civil formalities. Does it not in reality presume to attack the contract itself? Does it not presume to annul the contract, as though this were not beyond its power? Is it not intended to loosen the conjugal bond to such an extent that the parties cease to belong to each other, that they become strangers to each other, and capable of contracting a new alliance (3)?

The law of divorce is not less iniquitous :

2. In its consequences.

In reality it is incapable of effectively breaking the marriage bond; but it grants a legal faculty for violating the indissolubility of marriage, and hence is responsible for the consequences. These consequences we have indicated in n° 180; the education of the children is imperilled, mutual love and conjugal fidelity are enfeebled, and finally the existence of marriage itself is called into question.

1. See the evidences quoted above, n° 204, note.

2. The lawfulness of divorce is not, therefore, a necessary consequence of the institution of civil marriage, though BONOMELLI seems to admit this (o. c., p. 59) : « Posto il principio del matrimonio civile, è necessaria e naturale la conseguenza del divorzio : il matrimonio diventa un contratto come qualunque altro, e non v'ha ragione di volere che questo sia indissolubile, mentre tutti gli altri non lo sono, né lo ponno essere ». Nevertheless, considering matters in the concrete, it is beyond question, as we have already noted in n° 203c, that the intrusion of civil marriage enfeebled the idea of indissolubility, and thereby opened the way for divorce. Moreover, in the mind of the legislators of 1792, the one was involved in the other.

3. The law of divorce has in view the dissolution of the marriage bond itself, and not merely the annulling of the civil formalities that accompany marriage. This results from the very nature of civil marriage dissolved by divorce. In fact, civil marriage, *in the eyes of the law*, far from being a simple declaration made by the contracting parties in order to regularise their civil position, is considered as a true matrimonial contract, conferring on the parties the title of married persons, with all the rights and obligations proper to the married state. The very terms of the Code prove this, no less than the origin and the institution of civil marriage; of which more later.

In vain *those who favour civil divorce* appeal to the *liberty of worship*, as though the one liberty implied the other ⁽¹⁾. We reply, first, that liberty of worship is not the ideal, and we maintain the distinction between the thesis and the hypothesis. Moreover and especially, the civil authority cannot maintain the right to permit divorce even to those whose religion authorises the dissolution of marriage. To safeguard liberty of worship and of conscience does not mean granting to citizens without distinction all that the various religions concede, even in defiance of the higher law of nature and contrary to the commonweal. That is evident, and it is not less clear that the natural law and the good of society require the indissolubility of marriage. Moreover, it is thus that the law reasons when it proscribes polygamy; and one admits that the law is right, although plurality of wives is permitted, for instance, by the Mohammedans and the Mormons.

210.
b) in particu-
lar points :

II. IN PARTICULAR.

Even supposing it to be tolerable, in certain cases, for the civil law to permit divorce ⁽²⁾, there are certain provisions in the Belgian Code that must be disapproved in any case. Thus :

causes of
divorce.

A. Concerning the causes of divorce.

1. *Mutual consent* ought not to be admitted, as LAURENT himself suggested, in his *Avant-Projet*, II, p. 17 s. ; the admission of this cause, he says, consecrates, not in theory or in the mind of the legislator, but in practice and in fact, the error « which likens marriage to an ordinary contract, and permits it to be dissolved, as it is formed, by the consent of the contracting parties » ⁽³⁾.

2. The significance of the term *injuries* ought to be made more precise and restricted, whereas the practice of the Courts is to widen its meaning, so as to include among causes for divorce so-called real injuries, thus leading

1. See n° 204, in note, how Treilhard invoked this liberty of worship

2. It follows sufficiently from what has been said, that the law of divorce, of its own nature, is bad and deserving of condemnation. Yet we ought not hastily to conclude that its suppression pure and simple is to be desired, in countries *where civil marriage is in force*. As DE BECKER well remarks, *De Matr.*, p. 428 : « If civil marriage, so different from true marriage, were to be considered indissoluble, and.... on that understanding, were to be always assured of the protection of the law, whilst the Church so often declares these pretended unions to be mere concubinage, we should be involved in consequences, the inconvenience and misery of which are only too patent ».

3. This cause was suppressed in the French law in 1884, and likewise rejected in the German law promulgated in 1896. Cf. art. 1564 ss. ; RIBEROLLES, o. c., p. 107 and 161.

to the evasion of the law, and to the obtaining of dissolution of marriage for causes that are not legal ; as is shown very clearly by LEMAIRE, *o. c.*, p. 173-177, and RIBEROLLES, *o. c.*, p. 118 ss.

3. Furthermore, the provision of art. 310 ought to be struck out. As it is, the culpable party, against whom the separation was granted, has the right to demand a divorce, and the judge is bound to pronounce it ⁽¹⁾ whenever, after three years of separation, the innocent party refuses to renew conjugal relations, at least when such a course is morally possible ⁽²⁾.

« Does not this put the innocent party at the mercy of the culprit, and, contrary to all justice, secure to the latter the right of profiting by his misbehaviour ?... Art. 310 is opposed to the very purpose for which the law sanctions separation : the law sanctions it out of respect for religious scruples ⁽³⁾ ; then it compels the party who applied for a separation, to be divorced in spite of scruples ». LAURENT, *Avant-Projet*, p. 16. See also LEMAIRE, *o. c.*, p. 178 s. ; PLANIOL, *o. c.*, I, nos 1349 and 1351. ⁽⁴⁾

B. Concerning corporal separation.

Since separation was introduced into the Code out of consideration for Catholics, to take for them the place of divorce, it would be equitable and in accordance with the purpose of the law, that separation should be available for the same causes as divorce, that it should have the same effects as the latter, and that it should be freed from such embarrassing conditions as may from time to time morally compel Catholic parties to prefer divorce ⁽⁵⁾.

concerning
separation.

1. *Répertoire décennal*, I. c., n° 100.

2. Several judicial decisions have resulted in applying the law even in cases when it was morally impossible for the innocent party to re-establish conjugal relations. Cf. *Répertoire décennal*, I. c., nos 96, 97, 101, 103 ; see above, n° 207.

3. See above, n° 204.

4. The modified text of art. 310, to be voted on by the Belgian Senate, March 16th 1911, is as follows (*Annales Parlementaires*, Séance du 16 Mars, p. 243 s.) : « When separation, pronounced for any other reason but adultery, has lasted three years, the original defendant has the right to demand a divorce from the Court, and the Court *may* grant it, if the original complainant, either present or duly summoned, does not consent immediately to put an end to the separation ». If this text passes into law, the sentence of separation will not be converted *de jure* into a sentence of divorce ; the conversion will be left to the discretion of the judge, who will have to adjudicate on the entire situation in view of the common interest of the parties, the interest of the children and that of public morality. See the speech of the Minister of Justice, Séance du 16 Mars 1911, I. c., p. 228.

5. Such is the case in the German Code : separation is obtainable for the same causes as divorce ; the same effects follow, except ability to contract a fresh marriage in case of separation. See art. 1586.

of the *co-operation* afforded in evil results, or of the *mediate co-operation* in the bad act of another (¹), in case the scandal or the results in question are so great and of such a nature that they are not counterbalanced under any circumstances.

2. Any action is *unseemly* which it is *possible to perform without fault*, which is therefore good as to its object, but which is burdened with an evil circumstance that nevertheless may be separated from it or counterbalanced. It is enough in that case that there should be a *sufficient and proportionate reason for acting* (²).

B. Demonstration.

does not
seem intrin-
sically evil,

1. To grant a divorce is not an act intrinsically bad on account of its object.

Taken in itself, this act implies only the dissolution of the civil ceremony of marriage and by no means the breaking of the matrimonial bond, which in fact remains untouched (³).

Strictly speaking, the real marriage which still subsists is undoubtedly deprived of its civil effects and of its recognition before the law, and the parties obtain legal power to contract a new union ; and hence it is that cooperation is unquestionably lent to the evil effects of the law as well as to the sin of another ; but the specific object of the act is nevertheless the dissolution of the civil formalities and nothing more.

2. To grant a divorce is not any the more an act intrinsically evil because of the existence of an **evil circumstance** inseparably bound up with it and not admitting any counterbalancing good effect.

a/ In the first place, it does not necessarily imply a *bad intention*. On the one hand, the *explicit* intention of violating the law of indissolubility or of usurping the jurisdiction of the Church may easily be absent from the mind of the judge and of the public offi-

1. Right Rev. Dr. WAFFELAERT, *Coopération*, p. 6 s. holds that this is co-operation in the broad sense of the word, and at the same time indirect scandal.

2. S. THOMAS, *Quodlib.*, IX, art. 5, in corpore.

3. « As civil marriage does not in any way affect, as a marriage, the *forum internum*, so divorce does not affect in any way a religious marriage or marriage properly so called... As the Church tolerates civil marriage, provided that effects which it does not possess are not attributed to it, so we cannot see how the granting of civil divorce can be intrinsically bad apart from its effects ». Right Rev. Dr. WAFFELAERT, *Coopération*, p. 70 ; cf. BALLERINI-PALMIERI, o. c., VI, Editor's note, n° 802.

cial ; on the other hand, it cannot be said that this intention is *implicitly* and necessarily contained in the pronouncing of the divorce itself, as if the official, in giving effect to this impious law, were supposed to conform his intention to the evil intention of the lawgiver ⁽¹⁾. This would happen only in the supposition that the law was really effective and actually dissolved the marriage bond ; or if there were question of applying the law in hatred of religion.

b/ Neither is there *immediate co-operation in the sins of others*.

In fact, neither the judge nor the civil officer, in pronouncing a divorce, shares immediately in the sin of the parties who, perhaps, intend to lead a life of concubinage, nor uses his influence effectively and *immediately* to impel them thereto, by counsel, by command or by any sort of pressure. What he does is simply to give the parties the power and the legal means of leading a life of sin and of violating their marriage duties ; this does not constitute immediate and direct co-operation in sin, but simply *indirect and mediate* co-operation, since the subsequent sins will depend upon the bad will of the parties, following upon the granting of the divorce.

*but simply
unseemly,*

c/ With regard to *indirect scandal*, possibly given to the public, on account of the judge and the State official may prevent it to a considerable extent by declaring on the occasion, or making it apparent in some other way, that they intend to respect the matrimonial bond ; moreover, the exigencies of their position sufficiently excuse them on this head.

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operation in
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These sins may indeed be very grave, and these effects are calamitous, as we have already said in n° 180, for the children, for the family and for society. Nevertheless, these evils do not appear absolutely to exclude counterbalancing good ; there may possibly exist causes sufficiently urgent to render legitimate the judge's co-operation.

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On the one hand, in fact, the more distant the co-operation, the easier it is to establish an equilibrium between the good effect and the evils foreseen ; moreover, we must take into account the fact that, if the Catholic judge or the public official refuses to apply the law, there will be no dearth of other magistrates to do it in their stead. On the other hand, without taking into account the personal interest of the officials in question in retaining their position, it is of the highest importance, from the point of view of *public policy*, that Catholics should not be compelled to resign *en bloc*, as it were, and thus leave their province to become the exclusive preserve of men indifferent or inimical to religion.

so that, apart from particular circumstances and positive prohibition, the pronouncing of a divorce may be lawful ;

We except, however, the case of *special circumstances* and of *positive prohibition on the part of the Church* ; because it may happen, for instance, that the law has been promulgated out of hatred for religion (although its application may not, perhaps, be required in the same spirit), or that it may be quite recent, in which case there may be hope of obtaining its abrogation by energetic resistance. It would then be more difficult to excuse a judge or a public official, and the Church would take the initiative more promptly in issuing a positive prohibition.

Note. — Our explanation, which tends to justify in general the conduct of the officials in question, evidently deals only with the case in which they cannot withhold granting a divorce without infringing the law. The judge is bound as far as possible to the strict interpretation of the law ; he may grant a divorce only when the text of the law compels him unquestionably to do so ; any application of the law beyond its strict tenour and the limits which it imposes, is criminal ; and this fault, unhappily, is only too frequent (¹).

C. Agreement of our thesis with the Roman Instructions.

this opinion is not opposed to the Roman documents,

We may quote here many replies of the Holy See, openly favouring our opinion and denying the intrinsic malice of the act

1. RIBEROLLES, O. C., p. 118-122, remarks that not only do many judges unduly stretch the plea of injury, but that they are often too speedy and too easy in granting divorce to parties who obtain the « *pro Deo* » and who are designated « *assistés judiciaires* ». On the subject of this abuse cf. also *La Rev. ecclés. de Liège*, 1905-1906, p. 324 s. ; the *Bien Public*, 26 Jan. 1899 and the *XX^e Siècle*, 6 Oct. 1903 and 9 Oct. 1904.

of the judge and of the public official. Such are the declaration made by the C. S. O. to the Apostolic Nuncio in Belgium, and communicated on the 14th of September 1886 to the Minister of Foreign Affairs (¹); and the reply of the Sacred Penitentiary, of the 24th of September 1887, to the Bishop of Luçon (²), declaring lawful the aforesaid pronouncement in the case proposed. Hence we infer unhesitatingly the absence of intrinsic malice; for, on the contrary supposition, the act in question could not in any case be licitly performed (³).

On the other hand, however, the severity of certain answers from Rome, notably the decrees of the C. S. O. of 25 June 1885 (⁴),

1. The S. Congregation declares that the Decree of the 27th of May 1886, condemning, for France, the pronouncing of divorce, « does not concern Belgium, and that consequently nothing is modified in that country touching the matter of divorce ». The *N. R. Th.* gives the complete text of this reply in t. XIX, p. 73 s., and it interprets it in t. XXIII, p. 669 s. Read on this subject DE BECKER, *De Matr.*, p. 473 s., in note: he rejects as unworthy of the Holy See the opinion of certain authors (even of Gasparri, o. c., II, n° 1243), who maintain that this declaration is a purely diplomatic reply which notes the fact and reserves the right. Cf. also FEYER, *De Imp.*, n° 549, p. 499.

2. The bishop had asked whether the public official could pronounce divorce in case he is forced to do so under penalty of losing his situation, provided he publicly admits the incompetence of the judge in a matter of marriage and the inefficacy of divorce in conscience. The reply was that it is allowable for the official in question « to perform the act of which mention is made in the question ». A full account of the Decree may be found in the *THEOL. MECHL.*, o. c., p. 188; cf. *N. R. Th.*, t. 21, p. 616 s.

3. GASPARRI, o. c., II, who espouses the severe opinion in n° 1248, acknowledges in the preceding number « that this rescript gives rise to a serious difficulty against the rigorous opinion...; for, he says, it follows that the existence of the religious bond does not prevent, *under certain circumstances*, the tolerating of the act of the public official... who pronounces the sentence of divorce »; and, he adds, « the explanations given hitherto by the holders of the rigorous opinion do not appear to be solid ». In fact, as we have just said, to establish the truth of our thesis, *one single case*, in which the act in question is permitted, is enough; and consequently it is of little consequence that the S. Penitentiary, on the 4th of June, 1890, declared that the rescript to the Bishop of Luçon concerned only one particular case and that the solution could not be extended to analogous cases. *N. R. Th.*, t. XXII, p. 506.

4. « After the recent re-establishment of the law of divorce in France, in 1884, many doubts were laid before the S. C. of the Inquisition by the French Bishops, for the purpose of ascertaining if it was lawful for lay judges to give judgment in

and especially that of 27 May 1886 (1), would seem to support the contrary opinion. But this apparent contradiction is undoubtedly to be explained in the following way : In these latter cases, by

cases of matrimonial separation, whether *a vinculo*, or simply *a mensa et toro* ; and if it was lawful for barristers and solicitors to plead such causes before civil judges ; also if it was lawful for those, whose business it is, to appoint official counsels for the defence in these cases ; and finally, if the *maîtres* could pronounce divorce. Their Eminences the Inquisitors General and I, after mature consideration of the question, have thought it right to decree as follows, Thursday, 25 June 1885 :

Considering the very grave circumstances of time, place and object, it may be tolerated that magistrates and barristers should occupy themselves with matrimonial cases in France, without being obliged to resign, provided that they publicly profess the Catholic doctrine which assigns marriage and marriage cases to the ecclesiastical judges exclusively, and provided that on the question of the validity or nullity of marriage as well as of simple separation, cases of which they are required to deal with, they are disposed never to pronounce a judgment contrary to divine or ecclesiastical law, or to defend the doing so, or to encourage or incite others to do so ; provided further, that in doubtful and difficult cases they apply to their own Ordinary and conform to his judgment, and, if necessary, have recourse through him to the Apostolic Penitentiary. His Holiness has ratified this decree ; and consequently we bring it under the notice of all the Archbishops and Bishops of France for their guidance, by these letters which must not be made public ». *N. R. th.*, XVIII, p. 489 ss.

I. The following doubts were proposed by some French Bishops to the S. R. et Univ. Inquisitio : « In the letter of the S. Inq. of the 25 June 1885, addressed to all the Ordinaries of France on the law of civil divorce, it is decreed as follows : *Considering the very grave circumstances of time, place and object, it may be tolerated that magistrates and barristers should occupy themselves with matrimonial cases in France, without being obliged to resign*, under certain conditions, of which the second is : *that on the questions of the validity or nullity of marriage as well as of simple separation, cases of which they are required to deal with, they are disposed never to pronounce a judgment contrary to divine or ecclesiastical law, or to defend the doing so, or to encourage or incite others to do so* ». It is asked :

I. Is the interpretation, common in France and even found in print, correct, which declares that the aforesaid condition is fulfilled, when the judge, *abstracts* from a marriage contracted before the Church validly, so as to apply the civil law and pronounce that there is ground for divorce, provided that he has the intention of dissolving only the civil effects and the civil contract, and the terms of the decision given are confined to that alone ? In other words, can it be said that a decision pronounced under these conditions is not contrary to divine or ecclesiastical law ?

II. When the judge has pronounced that there is ground for divorce, can the *maître*, having regard to the civil effects and the civil contract alone, as we have

reason of particular circumstances, the ecclesiastical authority has thought it opportune to show greater severity. This circumstance was, perhaps, in the case of France (which country the two decrees concern), the recent introduction of divorce by the law of 1884. The Holy See may have looked for the arising of some effective opposition; and thus we can understand how, in the case of Belgium, where the circumstances were different, the Holy Office did not wish to impose the same strict line of conduct (¹).

Modern authors, who treat of this question, differ in their opinions. Some hold that the pronouncing of a divorce is intrinsically evil, or that it is at least always unlawful; others, especially the bulk of Belgian theologians, take a less rigorous view. and it is supported by many authors

The principal supporters of the more rigorous opinion are

just said, pronounce the divorce, though the marriage is valid before the Church?

III. When the divorce has been pronounced, can the said *maire* civilly unite with a third person the party who wishes to marry again, though the first marriage is valid before the Church and the other party is still living?

On Thursday, 27 May 1886, in the General Assembly of the Holy Roman and Universal Inquisition, the above doubts having been laid before their Eminences the Cardinals Inquisitors General; the same, after having heard the *Votum* of the Consultors, ordered answer to be made: — to the first, second and third doubts, *in the negative*.

On the same day, after the matter had been laid before our Holy Father Pope Leo XIII, His Holiness approved and confirmed the decisions of the Cardinals ». *N. R. th.*, XXIII, p. 379 s.

These are the two decrees to which the supporters of the rigorous opinion appeal. The other Roman documents dealing with this controversy, either simply refer to the above, like the answer of the S. Penit. of 4 April 1887 (*N. R. th.*, XIX, 391 s.), or can be taken in either sense, like the decree of the C. S. O. of 26 July 1887 (*N. R. th.*, XXIV, p. 373), where it is said: « It is necessary to urge most strongly... the judge in question (a *Président de Tribunal*, who asked for directions to be followed in the matter of pronouncing divorce) to retain his office, while keeping to the restrictions laid down by the Holy See, and to the precautions suggested by prudence ». The *N. R. th.*, XXIII, p. 667 and XXIV, p. 376 s. gives the interpretation of this decree.

1. Thus the solutions given for France on the one hand, and for Belgium on the other, do not involve a diversity of doctrine, but simply of discipline, as the minister Renkin rightly observed in the Belgian Chambers, 23 Nov. 1904. Cf. *les Annales Parlementaires*. — Chambre des Représentants, 1904-1905, p. 93, and cf. p. 63, where Mr. Hymans refers to this pretended contradiction.

BUCCHERONI ⁽¹⁾, BAUDIER ⁽²⁾, AERTNYS ⁽³⁾, ROSSET ⁽⁴⁾, PLANCHARD ⁽⁵⁾, GASPARRI ⁽⁶⁾, and LAVIALLE ⁽⁷⁾. To these may be added the *Conferentie Romanæ* of 1899 ⁽⁸⁾. The other opinion is maintained by Right Rev. Dr. WAFFELAERT ⁽⁹⁾, BALLERINI-PALMIERI ⁽¹⁰⁾, LEHMKUHL ⁽¹¹⁾, GRANDCLAUDE ⁽¹²⁾, DE BECKER ⁽¹³⁾, GENICOT-SALSMANS ⁽¹⁴⁾, LEITNER ⁽¹⁵⁾, BOVENS ⁽¹⁶⁾, MARC ⁽¹⁷⁾, THEOL. MECHL. ⁽¹⁸⁾,

1. O. c., II, p. 983, and in the *Enchir. Morale*, p. 219 s.; also in the *Supplem. ad Promptam Bibliothecam Lucii Ferraris*, 1899, under *Divortium*.

2. *N. R. th.*, XVIII, p. 231 ss.

3. *Theol. Moral.*, II, n° 522, quaer. 3.

4. O. c., VI, n° 4085 ss.

5. *N. R. th.*, XVIII, p. 473 ss. and especially p. 500, where he declares that it is never lawful for a judge, at least in France, to pronounce a divorce for any cause whatever; though he does not admit the intrinsic malice of the act.

6. O. c., II, n° 1248, where he says that he inclines to the rigorous opinion. Thus also in the edition of 1904, n° 1554.

7. O. c., p. 91 ss., compare with p. 77.

8. GASPARRI, O. c., II, n° 1242: « Dum casus conscientiae discuteretur Romae in ecclesia S. Apollinaris, die 11 Martii 1889, viri, qui mentem S. C. Inq. optime perspectam habebant, publice affirmarunt S. C. hoc decreto (27 Maii 1886) sententiam divortii civilis damnavisse tanquam intrinsece illicitam ».

9. *Coopér.*, p. 96 ss.; cf. the *N. R. th.*, XIV, XVI, XVII, and XVIII.

10. O. c., p. 390-397.

11. O. c. II, n° 701, in note.

12. O. c., p. 8 s., where he proposes another interpretation of the decrees of the Holy See, especially of those of 25 June 1885 and 27 May 1886. He thinks that the Holy See, in the former decree, taught the lawfulness of pronouncing divorce under the stipulated conditions, and that in the following year it only reprehended such an act in the same measure, that is to say, in so far as the required conditions were not fulfilled. The decree of 1885 requires two conditions, while the consultation of 1886 inserts only one, and omits that which requires the functionary to declare publicly that the regulating of marriage belongs exclusively to the Church. « La décision du 27 mai (1886) écarte une application tronquée et abusive de la déclaration générale du 25 juin (1885) ».

13. *De Matr.*, p. 426 ss.

14. O. c., II, n° 561.

15. O. c., p. 634 s.

16. O. c., p. 34 ss.

17. O. c., II, n° 2126. LAVIALLE, O. c., p. 51 s., says of Marc, that, after having maintained the broader opinion before the decree of 1886, he then abandoned it, but adopted it again after the rescript to the Bishop of Luçon.

18. O. c., n° 183 ss.; cf. also the *Quaestiones in Conf.*, 1898, p. 52 ss.; *La Vie diocésaine Documenta*, 1912, p. 55 ss.

BESSON (1), COLLAT. TORNAC. (2), SALSMANS (3), REVUE PRAT. D'APOL. (4) NOLDIN (5). Finally, FEYE (6), VLAMING (7), ALLÈGRE (8), and DE LUCA (9) are undecided.

An objective examination of the question and arguments drawn from authority lead us to the following *Conclusion*: Until the Holy See has spoken more clearly, there is no need to look upon the declaration of a judge in authorising divorce, and the action of a municipal officer in pronouncing it, as intrinsically evil; in particular, as far as Belgium is concerned, we cannot condemn the functionaries who act thus whenever their office requires it of them, provided they avoid giving scandal.

FIFTH COROLLARY.

A. A petition for civil divorce on the part of a Catholic, who is indissolubly united in a valid marriage, does not appear to be intrinsically evil, but merely unseemly; so that, apart from special circumstances and the positive prohibition of the Church, it may be justifiable at times, though rarely so. 213.
5. Petition for civil divorce:

B. We are of opinion that the like holds good for the counsel for the petitioner.

Explanation and demonstration.

1. The action of a Catholic in petitioning for a divorce is not, as we have already shown, intrinsically evil by reason of its object, nor is it so, by reason of any inseparable and incompensable circumstance. a) on the part of the husband or wife,

If the reader will refer to what we have said above, he will easily see that there is here no question of *perverse intention*; it is supposed that the petition is not made with the intention of marrying again; neither is there any *immediate co-operation* in the sin of another. There may be some indirect scandal, but a suitable declaration is capable of removing that to a great extent. is not an action intrinsically evil,

1. R. th. fr., 1905, p. 371 ss.

2. Year 1908, p. 591 ss.

3. O. c., p. 42 ss.

4. T. XI (Jan. 1911), p. 531 s.

5. Summa theol. mor., III, 1908, n° 672 ss.

6. De Imp., n° 584, 5.

7. O. c., II, n° 598.

8. O. c., I, p. 218 ss.

9. O. c., n° 1058.

but merely
unseemly,

Again, there is nothing more than material *mediate co-operation* in the contingent sins of the other party, and co-operation in the evil effects of the law ; thus the question is reduced to one of the existence of a proportionate cause justifying such co-operation.

on account of
the scandal
and co-opera-
tion ; to legi-
timate it,
there is
sometimes,

1. *In countries where the civil law does not admit simple corporal separation*, this cause is not very hard to find. Divorce is then the sole means of legitimating in the civil law separation *a mensa et toro*, and of avoiding disagreeable legal consequences ; but there must first be a declaration of the Bishop permitting the separation.

2. *In other countries :*

a/ *Generally* there is no sufficiently urgent reason to justify a petition for divorce rather than for separation. The desire to avoid the inconveniences of separation, as being relatively greater than those of divorce, does not ordinarily suffice to outweigh the deplorable consequences of the latter.

though
rarely,

To be precise, we maintain that it is not sufficient to allege *the provision of art. 310*, which permits the guilty party, against whom a decree of separation has been pronounced, to have this converted into a decree of divorce after an interval of three years ; for, in this case the loss to the innocent party is not so considerable, seeing that the provision of art. 299, in favour of the party obtaining the divorce, is not applicable under the circumstances. See above, n° 207.

Moreover, it is not sufficient that the simply separated wife is at a certain disadvantage, in that she is under a *legal incapacity* that prevents her from acquiring and alienating possessions without the consent of her husband ; the less so, as art. 218 empowers the judge to supply the want of such consent.

Finally, *as a general rule*, we can in no way consider as sufficiently grave the disadvantage arising from *art. 312*, paragraph 1, which regards the children born of a separated wife as those of her husband. No doubt this provision lends itself to some very vexatious consequences, but they may for the most part be avoided, even under the Civil Code of Belgium, since paragraph 2 of the same art., as we have pointed out in n° 170, gives the husband the power of repudiating such children.

The answers of the S. Penitentiaria, of 5 Jan. 1887 ⁽¹⁾, 14 Jan. 1891 ⁽²⁾, 16 Apr. 1891 ⁽³⁾, and 7 Jan. 1892 ⁽⁴⁾, though they do not strictly prove it, yet support what we have said above.

b/ *Exceptionally*, however, especially in Belgium, it would seem that there may be such an accumulation of circumstances as would suffice to justify a petition for divorce.

a sufficient reason ;

We have particularly in view *the danger of intrusion of adulterine children*, in cases in which such danger cannot be removed by means of the provision contained in art. 312, paragraph 2. For, in order that the husband may, in conformity with the Belgian law, repudiate the child of his separated wife, it is necessary for him to prove that « pendant le temps qui a couru depuis le 30^e jusqu'au 180^e jour avant la naissance de cet enfant... il était dans l'impossibilité physique de cohabiter avec sa femme » ; but the proof of this may be rendered impossible by the wife's fraudulent and secret frequentation of her husband's house.

We are aware that the very case of which we are speaking has been submitted to the S. Penitentiaria and answered in the more rigorous sense, on Jan. 7th, 1892. But, in the first place, it is quite possible that this answer applies only to France, where the danger of this intrusion of adulterine children is more easily obviated than in Belgium, owing to the law of 1850 ; there also, as we have already observed, the Holy See may have taken into account the

1. To the proposed case of a woman who desired to get a divorce, because she could not otherwise obtain a public office, which she needed as a means of livelihood, the following answer is given : « the woman in this case must be advised that she is bound, *sub gravi*, to refrain from seeking a divorce ». *N. R. th.*, XIX, p. 74.

2. A woman is refused permission to petition for a divorce in order that she may thereby acquire the right of managing her property, and so avoid serious difficulties. *N. R. th.*, XXIII, p. 671.

3. In like manner, this permission is not granted to a woman who wishes to obtain a divorce in order that she may, before the civil law, assume the charge of a niece who has been deserted by her father. *N. R. th.*, XXIII, p. 677.

4. Finally, it is declared unlawful to proceed to divorce, even where it is desired by a husband whose wife is living in adultery, and who, being enceinte by some other man, returns from time to time to her husband's house for the purpose of making it impossible for the husband to repudiate paternity ; and hence, in the case in which a husband seeks divorce « pour pouvoir répudier cette paternité, pour empêcher l'introduction de nouveaux bâtards dans sa famille ». *N. R. th.*, XXIV, p. 528 ss.

particular circumstances of that country, and have acted with greater severity in consequence. In the second place, the answer of the S. Penitentiaria is limited to the particular solution of a given case ; and the same Congregation, some months later, 30 June 1892, thought it sufficient to answer : « Let the petitioner consult approved authors » (1).

Further, the majority of the authors quoted above in favour of our first thesis, support us equally in the present instance ; and we know that many of the episcopal chancelleries of Belgium have permitted recourse to be had to divorce in cases where the imminent danger of the intrusion of adulterine children could not be otherwise removed ; and even, on one occasion at least, in the case of a wife of irreproachable character and of good position, who had been ruined by the extravagance of her husband, and whose parents refused to assist her, unless a divorce were obtained, and the spendthrift thus deprived of any further power over the wife's property.

In practice, however great reason there may be for bringing an action for divorce, no Catholic could lawfully bring such an action before the civil courts, without having first consulted the ecclesiastical authorities. Moreover, if the bill proposed by Al. Braun and already adopted by the Belgian Senate, 16 March 1911, becomes law, the particular difficulties of which we have just spoken will practically disappear. See nos 210 and 170.

in like manner b) on the part of the barrister.

2. Where it is permissible for a married person to petition for a divorce, it is also lawful for barristers to plead their case. But, apart from this hypothesis, it is not lawful for them to undertake divorce cases, since on the one hand they are free to refuse the cases offered, and, on the other hand, the consequent loss of fees is in no way proportioned to the gravity of the evils that have to be avoided.

This prohibition must be observed even when it is quite certain that the parties do not intend to make an ill use of their divorce and marry again. For, though in such a cause, the counsel does not co-operate in adultery or concubinage on the part of the interested parties, he nevertheless does co-operate in the carrying out of the law, and therefore in the evil consequences that it entails

upon society ; and this is a matter of the greatest moment. Undoubtedly, if they refuse such cases, others less conscientious will accept them and pocket the fees ; consequently the effective co-operation of Catholic barristers is not so great as might, at first sight, appear, and therefore a reason that would justify them in accepting, might be the more easily found. Nevertheless, there is no denying that there is co-operation, and co-operation of such a kind as no consideration of private gain can justify.

There is, however, room for an exception in favour of the *stagiaires*, to whom the *Bureau des consultations gratuites* assigns a « pro Deo » of this kind. If the circumstances are such that they cannot refuse, and their professional duty imposes upon them one of these cases, they may, after a serious attempt to avoid the obligation, undertake it ; but they must then confine themselves to a simple statement, before the court, of the legal grounds on which the petition for divorce is based, while declaring that it is contrary to Catholic principles (¹).

In conclusion, then, one can follow in practice, at least in *Conclusion.* Belgium, and saving any instruction of the Holy See to the contrary, the opinion which holds as lawful, all the requisite conditions being fulfilled, a petition for divorce, whether on the part of the husband or wife, or, on their behalf, on the part of their counsel.

1. Equity demands that members of the *Conseil de discipline* and of the *Bureau des consultations gratuites* should respect liberty of conscience in the distribution of cases, and not assign to Catholics cases which they cannot conscientiously undertake, especially as there are plenty of barristers who have no scruple about doing so. To the praise of our courts be it said that in general their practice on this point is quite satisfactory.

Nevertheless there exist some decisions opposed to this spirit of equity, decisions which may indeed be reversed, but which, as things now stand, might be employed to compel all *stagiaires* to plead in cases of divorce. Such are the decisions of the Court of Brussels : *Cour d'Appel*, 22 Dec. 1875 (J. DES CRESSONNIÈRES, *Décisions du conseil de l'ordre des avocats près la cour de Bruxelles*, Bruxelles, 1907, p. 38) and 19 Jan. 1876 (*Pandectes Belges*, under *Bureau des Consultations gratuites*) : « Un avocat ne peut pas se prévaloir de considérations tenant à ses convictions religieuses, pour refuser de se charger de la défense d'une cause (juste d'après les lois en vigueur) qui lui a été distribuée par le bureau des consultations gratuites ».

SIXTH COROLLARY.

As regards the civil re-marriage of the divorced party :

An opinion which appears probable holds as justifiable the act of the municipal officer who civilly unites persons, one of whom is in the eyes of the Church validly married to another, but is divorced from that party before the civil law.

Explanation and demonstration.

214.
6. The lawfulness of the act of the syndic, who civilly unites a divorced party,

It is clear that in this case the co-operation given by the civil functionaries is more effective than in the two which we have been dealing with, and that it has a more direct bearing on the sins of the pseudo-married parties ; consequently it is the more difficult to find sufficient and proportionate reasons. Nevertheless, on the one hand, it would be hard to condemn indiscriminately all Catholic functionaries who have to discharge this office, and to make them choose between their conscience and their profession ; while, on the other hand, if all were compelled to resign, such a course would result in great injury to the general welfare.

appears probable.

Moreover, if they could not apply the law in the present case, neither could they in that of persons who are incapable of contracting a religious marriage by reason of some diriment impediment (¹).

We believe, then, that the more indulgent opinion is probable, strengthened as it is by the *support of authors of note*, like GENNARI and BOUDINHON, in their *Consultationes*, 2nd Part, II, p. 246 ; DE LUCA, o. c., n^{os} 1047 s. ; SCHNITZER, o. c., p. 77 s. ; BOVENS, o. c., 36-40 ; GENICOT-SALSMANS, o. c., II, n^o 562 ad 4^m ; LEHMKUHL, o. c., II, n^o 725, in note ; NOLDIN, *Summa*, II, n^o 680 ; WERNZ², o. c., n^o 208, p. 339 s. — GASPARRI, o. c., ed. 1904, n^{os} 1530 ss., is rather favourable ; as to HOLLWECK, o. c. p. 77, he recognises that our opinion is applicable in practice.

1. On the assistance of the municipal officer at the marriage of parties incapable of contracting a canonically valid union, cf. SANTI, in *l. IV Decr.*, Tit. III, n. 55 s., who thinks such co-operation quite lawful. GASPARRI, o. c., II, n^o 1230, says on this point : « Quamquam Santi non citat (in favorem suae theses) S. Poenitentiarium, tamen nonnulli suspicantur eum hanc doctrinam ex jurisprudentia ipsius S. Poenitentiarie desumpsisse, cujus fuit per plures annos canonicus et tandem regens per paucos menses ante mortem ».

Answers given by the Holy See to the contrary effect ⁽¹⁾, may be understood in a way analogous to the interpretation we have already given in several instances, according to which they may be taken, not as deciding the question of principle in relation to the intrinsic malice, but as simply pronouncing unlawful an act of this kind, in a certain country and *on account of certain particular circumstances*, and prohibiting it by a *positive defence*.

We may remark, in conclusion, that the priest who holds as certain the more rigorous opinion, in practice cannot do better than leave the municipal officer in good faith, and refer to the Ordinary any who consult him on the subject.

Scholion. *Post factum*, quando scil. detegitur pœnitens divor-
tium civile a matrimonio canonicè valido illicitè impetrasse, quo-
modo tractandus est *a confessario* ?

1. *Si non contraxit nec contrahere intendit novum matrimonium civile:* oportet ut pœnitens de peccato commisso, in quantum fuerit for-
male, sincere doleat ; præterea debet, si fieri potest, cum derelicta
comparte reconciliari ac consortium maritale reinstaurare ⁽²⁾ ;
quæ reconciliatio si impossibilis aut inopportuna judicetur, tene-
tur pœnitens scandalum forte provocatum reparare ac monere
parochum de separatione tecti instituta, et per eum sententiam
judicis ecclesiastici obtinere, attentis principiis propositis sub
n. 155 et 156.

Quibus præstitis, nihil jam obstat quominus ad sacramenta,
etiam publicè, admittatur pœnitens, ac imo potest absolvi seria
facta promissione de dictæ obligationis futura executione.

1. Such is the decree of the C. S. O. of 1886, quoted above, under C, fourth Co-
rollary; likewise the decree, sent in the name of the Card. Grand Penitentiary by
the Substitute, 28 Nov. 1883: « Having laid before His Eminence the Grand Peni-
tentiary the case of the municipal officer, ... who in virtue of his office was requir-
ed to assist at the civil marriage of a person already married in the eyes of
the Church, I have to make known to you, by order of the same, that the officer
in question could not in any way lend himself to an act so contrary to the
sanctity of marriage. Consequently, whatever the circumstances of the case may
be, he is bound to abstain entirely from such assistance, even if his position
depends upon it ». *N. R. th.*, XX, p. 399 s.

2. Sub n. 205 et 207, notavimus in Gallia et in Belgio non prohiberi conjuges
divortio separatos quominus iterum civiliter copulentur, salva nova celebratione.
Hoc obtinet in Gallia inde ab anno 1884, quando lex divortii est reintroducta ; in
Belgio, in hunc sensum moderatus est art. Cod. Civ. 295, anno 1906.

2. *Si ad alia vota transire attentaverit, novo inito matrimonio civili cum tertia persona :*

Optanda solutio foret ut, impetrato divortio civili ab hoc altero pseudo-vinculo, reconcilietur cum legitima comparte cum eaque vitæ conjugalís consortium reassumat ⁽¹⁾.

Quodsi ad hanc solutionem deveniri nequeat, urgendus est pœnitens ut saltem, reparato scandalo, a concubinato recedat, etiamsi locus non sit divortio civili obtinendo ⁽²⁾ ; nec potest ad sacramenta publicè admitti antequam concubinatum efficaciter abruperit, imo ad ipsam absolutionem non sufficeret, regulariter et extra casum urgentem, sola promissio de futura concubínatus abruptione.

Abrupto autem concubinato ac reparato scandalo, manet ut pœnitens, juxta dicta sub 1., moneat parochum et sententiam judicis ecclesiastici obtineat super separatione tecti ; quibus peractis potest, supposita resipiscentia, ad sacramenta admitti ; etiam potest sacramentaliter absolvi sub promissione hanc clausulam injectam exequendi.

Porro supponitur pœnitens non incurrisse excommunicationem, cum hujus absolutio absolutionem sacramentalem præcedere debeat ; posset nempe fieri quod, ex facto novi attentati matrimonii excommunicationem contraxerit, sive vi dispositionis juris communis ⁽³⁾, sive vi dispositionis juris particularis ⁽⁴⁾.

1. Huic novæ unioni inter conjuges divortio disjunctos adhuc locus est coram lege civili in *Belgio*, postquam novum successit matrimonium et alterum divortium ; non ita in *Gallia*. Cf. l. c., et *Collat. Brug.*, t. XI, p. 318 ss.

2. Non obstat huic concubínatus abruptioni existentia vinculi civiliter validi : vult quidem lex civilis ut cohabitent conjuges, sed in praxi vix unquam ad cohabitationem urgetur iudex. Cf. n. 150, cum nota.

3. Potest fieri ut, posito anathemate contra illos qui putant licere christianis duas uxores habere (C. Trid., Sess. XXIV, can. 2), hujusmodi pœnitens hæresim incurrerit, ideoque excommunicationem hæresi adnexam.

4. Ita in Conc. *Baltim.* III (a. 1884), n. 124, indicitur excommunicatio latæ sententiæ Ordinario reservata contra « conjuges qui, divortio civili obtento, novum matrimonium attentare ausi fuerint ».

SECTION IV

THE REGULATION OF MARRIAGE.

Preliminary note. The regulation of marriage implies the exercise of legislative, judiciary and coercive power ; it extends to the contract as such, as well as to the permanent bond created by it. The *legislative* power intervenes for determining the form of the contract, for establishing impediments, whether diriment or impedient, and, within the limits laid down above, for deciding what are the causes of dissolution or of corporal separation. The *judicial* power has to pronounce upon the validity or nullity of matrimonial contracts, as well as upon the reality and gravity of the causes of dissolution or of separation. The *coercive* power has for its province the prohibition of marriage, even under pain of nullity in punishment of certain offences, or the prohibition of the use of marriage ; and, in addition to this, the enforcing of respect for the obligations arising from marriage.

215.
What the
regulation of
marriage
implies.

PARAGRAPH I. THE REGULATION OF MARRIAGE OF BAPTIZED PERSONS.

I. RIGHTS OF THE CHURCH.

PROPOSITION. *The regulation of the marriage of baptized persons, particularly the power of establishing impediments, belongs exclusively to the Church and is its proper right, in virtue of the Divine Will, and in consequence of the nature of Christian marriage.*

216.
The regula-
tion of marri-
age of
baptized per-
sons belongs
exclusively to
the Church,

We will prove these statements one by one.

FIRST STATEMENT : *The regulation of the marriage of baptized persons belongs to the Church alone, to the exclusion of the civil power.*

First proof. Marriage validly contracted between baptized persons is a *sacrament* inseparable from the contract and making one whole with it. It follows from this that any regulating of the contract at the same time touches the sacrament ; it is impossible to impose conditions affecting the validity of the contract without thereby extending them to the reception of the sacrament ; no one can be incapacitated from the contract, without at the same time being incapacitated from the ministry of the sacrament.

It is true, as we shall presently see, that the exercise of jurisdiction over the matrimonial contract of baptized persons, and in particular, the establishment of impediments, does *not modify* the sacrament either in its matter or in its form, since the sacrament is present only when the contract is valid ; but it is equally true that, in view of the identity of the contract and the sacrament, one cannot regulate the one without interfering with the other ⁽¹⁾.

Now, it is quite evident that the administration of the sacraments naturally belongs to the Church alone, to the entire exclusion of the civil power : « To decree and ordain about the sacraments is, by the will of Christ, so much a part of the power and duty of the Church, that it is plainly absurd to maintain that even the very smallest particle of such power has been transferred to the civil ruler ». Encycl. *Arcanum*.

Second proof. Moreover, leaving out of the question the sacramental dignity, marriage considered in its natural character is a *holy* thing, not essentially and intrinsically, but in consequence of the end to which it is directed. For, its direct and immediate object is « the bringing forth of children for the Church, fellow citizens with the Saints, and the domestics of God » (Encycl. *Arcanum*) ⁽²⁾, and upon the right ordering of it (marriage), very much depends, which immediately concerns the common spiritual good ⁽³⁾.

1. CARRIÈRE, o. c., I, p. 399, therefore, is at fault when he compares the establishment of a diriment impediment, invalidating the Christian marriage contract, to the corrupting of the water or wine for use in Baptism or the Most Holy Eucharist, as if the one affected the sacrament no more than the other. Cf. *supra*, n° 104 ; MARTIN, o. c., II, p. 51 ss., where he fully refutes the argument of parity adduced by Carrière.

2. « Le mariage est, dit-on, l'entrée de l'Etat ; il est bien aussi l'entrée de l'Eglise. C'est de la main des époux que la société civile reçoit ses guerriers, ses magistrats et ses juges ; mais ce sont bien eux aussi qui donnent à l'Eglise ses prêtres, ses pontifes et tous les chrétiens, qu'elle conduit par la pratique de l'Evangile à la vie éternelle ». Thus the Author of the pamphlet : *Examen du pouvoir législatif de l'Eglise*, p. 116.

3. *Ibidem*, p. 116 s. : « Des mariages mal assortis naissent les divorces et les dissensions domestiques. Mais le divorce est encore plus réprouvé par la loi de Dieu que par la loi du Prince ; la discorde n'est pas moins opposée à la charité chrétienne qu'à l'harmonie sociale. Des mariages obscurs et clandestins naissent la bigamie, l'abandon des épouses et des enfants : désordres qui désolent l'Eglise

If, then, marriage is a sacred thing, as Leo XIII, l. c., argues, « it ought to be regulated and administered, not by the will of civil rulers, but by the divine authority of the Church, which alone in sacred matters has the office of teaching ». It is true that marriage *as immediately* concerns the conservation and growth of civil society ; and consequently, speaking in the abstract, the secular authority would have a right and a claim to the regulation of Christian marriage, apart from the sacramental dignity. But, taking things in the concrete, the State cannot assert its right *against the higher right of the Church*. It is necessary that the State should give way to the Church, since it is impossible that the same marriage should be regulated by two different powers, independently of one another ⁽¹⁾.

These considerations furnish a reply to the *objection* that is often made against the exclusive right of the Church over marriage, apart from its sacramental nature. *Maj.* : The civil authority can,

autant qu'ils affligent l'Etat. Les mariages incestueux offensent la nature ; mais Dieu est-il moins outragé que le Prince par les crimes qui outragent la nature ? La mauvaise éducation est le résultat nécessaire des mauvais mariages ; avec de la bonne foi on convient que la morale souffre, encore plus que la politique, du vice de l'éducation. L'Etat pourra faire d'un mauvais mari un bon soldat, et même un bon général ; mais il sera toujours un mauvais chrétien ».

1. Otherwise the same marriage might be at once valid and invalid ; the same parties might be considered by the spiritual judge as lawfully married and bound to cohabitation, and by the lay judge as unlawfully united and subject to separation. It may be answered that the parties interested have only to take into account both the ecclesiastical and civil impediments. Be it so ; but what are they to do, when the two authorities prescribe for the validity of the contract formalities that mutually exclude one another ? Cf. PALMIERI, o. c., p. 268 ss. ; HEUSER, o. c., p. 82-84 ; BASDEVANT, o. c., p. 40 s.

The possibility of this dual control of marriage was formerly admitted by certain Authors who favoured the distinction between the sacrament and the contract, like *Carrière*, *Gerbais* and *Ballot*, of whom we shall speak below, towards the end of n° 219, and also by the anonymous author of the pamphlet *Apologie du mariage chrétien* (p. 98 ss. and 119 s.). They relied on the hope that Christian Princes, in their matrimonial legislation, would conform to the laws of the Church, and that so all conflict would be avoided. MARTIN, o. c., II, p. 273-292, gives a lengthy refutation of the principle of duality.

so long as it does not infringe on the natural and divine law, make laws in regard of everything that is not intrinsically sacred, and that concerns the welfare of civil society. *Min.* : But this is the case with Christian marriage. *Therefore.*

We distinguish the major : If it is a question of something that concerns spiritual welfare directly, and temporal welfare only mediately, and through the former, the proposition is false. If it is a matter that concerns temporal welfare immediately, two hypotheses are possible : either no spiritual interest is involved, and then we concede the whole ; or the spiritual is as directly interested therein as the temporal ; and then, in default of the existence of a supernatural society, or when the two powers can be exercised concurrently, all is well ; but if there is a supernatural society, and regulation by the two authorities side by side is impossible, then it is for the civil authority to give way.

But, if Christian marriage immediately concerns the welfare and growth of civil society, it no less immediately concerns the welfare and propagation of the Church, and, as we have said, in this case the concurrent exercise of the two powers is impossible.

This latter argument, considering the impossibility of dual control, holds good also against those authors who deny the sacramentality of marriage, or insist on the distinction between the contract and the sacrament ; it is sufficient that they should not, with the civilists, hold the marriage contract a *merely secular* contract.

This is the formal teaching of the Sovereign Pontiffs, especially of Pius IX in the *Syllabus* (condemned propositions 68⁽¹⁾ and 71⁽²⁾) ; of Leo XIII, in his Encyclical *Arcanum*, in his Letter to the Bishops of Peru, 16 Aug. 1898 (*Anal. eccl.* 1899, p. 440), and to the Bishops of Ecuador, 22 Dec. 1902 (*Anal. eccl.*, 1904, p. 281) ; and of Pius X, in his Letter of 14 Nov. 1906 (*Anal. eccl.*, 1907, p. 53 s.).

1. « The Church has not the power of introducing diriment impediments of marriage, but this power belongs to the civil authority, which ought to remove those that now exist ». DENZINGER, O. C., n° 1768.

2. « The Tridentine form is not obligatory under pain of nullity where the civil power substitutes another in its place and decrees that marriage should henceforth be valid under it ». *Ibid.*, n. 1771.

See also the other documents quoted by DE BECKER, *De Matr.*, p. 30 ss., and FEYE, *De Imp*, nos 22-56.

SECOND STATEMENT : *This exclusive right of the Church is its proper right, belonging to it in virtue of the Divine Will, and in consequence of the very nature of marriage.*

217.
as its proper
right and in
consequence
of the very na-
ture of mar-
riage ;

We say : 1. *It is its proper right*, that is to say, « independently of the consent and good will of the secular authority » and « not having its origin in any way in the civil power » (¹).

2. This right belongs to it *in consequence of the very nature of marriage* : that is, it is in no way based on any *positive law of the Church*, like, for instance, « the causes and civil lawsuits of the inferior clergy, which are amenable to the secular courts, but which a positive law of the Church formerly reserved exclusively to the ecclesiastical tribunal » (²). On the contrary, in the words of Leo XIII (*Arcanum*), it is clear that the power of the Church over Christian marriage « belongs to it of right, and is in no way dependent on the good will of man, but on the will of its divine Author ».

This assertion needs no proof after what we have already said ; all the arguments adduced in the preceding pages demonstrate this *proper* right of the Church, and show its dependence on *the divine law and the very nature of Christian marriage*. The Holy See is again quite explicit in this regard : PIUS VI condemns the 59th

1. DE BECKER, *De Matr.*, p. 30 s.

2. WERNZ, o. c., n. 55 et 56, ad 3^m. Cf. SCHNITZER, o. c., p. 46 ss., in note 3, where this author, though, on page 38 s., he defends the identity of Christian marriage and the sacrament, contends that the exclusive right of the Church « im positiven Kirchenrecht gelegen ist, das aus wichtigen Gründen jene Befähigung der Kirche reservirt hat ». In the same sense also formerly wrote SANCHEZ, o. c., l. VII, Disp. III, n. 2 ; the SALMANTICENSES, o. c., c. IX, n. 14 et 15, together with others mentioned by WERNZ, o. c., n. 56, who maintained that the regulation of Christian marriage, of itself, belonged at once to the Church and the State, but in such a way that the Church had the power to reserve to itself matrimonial legislation, to the exclusion of the civil State, as in fact it has reserved it ; but they reduce this power of reservation to an indirect power, which the Church here exercises by withdrawing marriage from the power of Princes on account of its connection with the sacrament. Cf. also PONTIUS, o. c., l. VII, c. II, n. 3. Against the fact of this reservation, see GIBERT, *Tradition ou Histoire*, I, p. 18 ss.

proposition of the Synod of Pistoja ⁽¹⁾, and Pius IX condemns the 69th proposition of the *Syllabus* ⁽²⁾.

218.
so that the
Church alone
has over such
marriage
legislative
power,

THIRD STATEMENT : *This regulation, which belongs exclusively to the Church, involves the exercise of the legislative, the judicial, and the coercive power.*

The proofs already furnished bear directly on the *legislative* power ; but they suffice at the same time to show that the *judicial* power, and, when occasion requires, the *coercive* power belong likewise and exclusively to Rome.

judicial
power,

The *judicial* power offers no difficulty. « It is a universally accepted axiom, that it belongs to him who made the law to judge the cases that arise under it, or, in other words, that he who has the legislative power in a matter, has also the judicial power in the same » ⁽³⁾.

Moreover, the *Council of Trent*, Sess. XXIV, can. 12, teaches that matrimonial causes « appertain to the ecclesiastical judges » ; and *Pius VI*, in his letter to the Bishop of Motula, declares that this is to be interpreted in the exclusive sense : « for, he says, « the terms of the canon are so general as to comprise and include *all* causes. Moreover, the spirit and nature of the law are of a kind to exclude any exception or limitation ; for, since such causes are subject to the judgment of the Church alone, solely on the ground that the matrimonial contract is really and properly one of the seven sacraments, given that this sacramental quality is common to *all* matrimonial causes, they *all* consequently fall under the exclusive province of the ecclesiastical judges, seeing that the

1. DENZINGER, O. C., n° 1559 : « Doctrina Synodi asserens, ad supremam civilem potestatem dumtaxat originarie spectare, contractui matrimonii apponere impedimenta ejus generis, quæ ipsum nullum reddunt dicunturque dirimentia... ; subjungens, supposito assensu vel conniventia Principum, potuisse Ecclesiam juste constituere impedimenta dirimentia ipsum contractum matrimonii : quasi Ecclesia non semper potuerit ac possit in christianorum matrimoniis jure proprio impedimenta constituere, quæ matrimonium non solum impediunt sed et nullum reddant quoad vinculum... canonum 3, 4, 9, 12, Sess. XXII, Concilii Tridentini eversiva, hæretica ».

2. « The Church began to establish diriment impediments in the course of time, not in virtue of its own proper right, but of a right borrowed from the civil power ». *Ibid.*, n° 1769.

3. AICHNER, O. C., p. 564.

reason given applies to all » (1). Finally, Pius IX, in his *Syllabus*, n° 74, condemns the proposition that says : « Marriage and betrothment causes belong, of their nature, to the civil courts ».

Thus, then, if the doctrine of the exclusive judicial power of the Church with relation to *all* matrimonial causes, is not defined as an article of faith, it cannot be denied without error or temerity.

The *coercive* power is the natural complement of the legislative and judicial power, since coercion is sometimes necessary for the application and execution of the laws and judgments, and for the effective safeguarding of public morality in the matter of marriage. We must accordingly acknowledge that Rome, having the regulation of marriage, has also the right of dealing with offending spouses, and of annulling, for instance, marriages contracted between an adulterous husband or one who has murdered his wife, and the accomplice of his guilt ; the right also of punishing incest by prohibiting the use of marriage ; together with that of constraining married persons to separate, as well as to resume conjugal intercourse.

This power belongs to the Church alone ; but the secular arm may here come to its assistance, within the limits of a due dependence and subordination.

FOURTH STATEMENT : *The regulation of marriage, thus understood, implies for the Church, and for it alone, the power of establishing impediments both diriment and impeding, within the limits of the natural and divine law.*

219a.
together with
the power of
establishing
impedient and
diriment
impediments.

This is obvious. The common good requires in this matter over and above the prescriptions of the divine and natural law, prohibitive measures and also invalidating clauses, e. g., for the purpose of restricting marriages between those related by consanguinity or affinity, for effectively preventing the marriage of the accomplices in certain crimes, and so forth. The Council of Trent, Sess. XXIV, can. 4, has authoritatively confirmed this doctrine, and declared, under anathema, « that the Church has received the power of establishing diriment impediments of marri-

I. HEUSER, O. C., p. II s., gives the full text of the letter and the circumstance that gave occasion to it.

age (1) ». Cf. also the 59th proposition of the Synod of Pistoia.

It is often *objected*, that marriage is a sacrament instituted by Our Lord, that therefore its nature and character cannot be modified, and that its matter and form, according to the teaching of the Council of Trent, must remain free from all substantial change. This objection is sufficiently specious, especially in so far as it concerns impediments relating to the formalities of the contract (2).

The answer, however, is easily given. If Christian marriage is a sacrament, it is also at the same time a contract ; but the contract which was elevated by Our Lord to the dignity of a sacrament is not any matrimonial contract whatsoever, but only the *valid* contract, that is to say, one made under the conditions that the competent authority requires for its validity. The Church can,

1. With regard to the canon of the Council and the interpretation to be put upon it, see the *Declaratio super doctrina professorum seminarii generalis Lovanii* of the Archbishop of Malines (Card. de Franckenberg), of 26 June 1769, in KUTSCHKER, o. c., I, p. 69 ss. ; and compare with MOSER, o. c., p. III ss. ; in this Declaration, the Prelate, after vindicating the dogmatic character of the canon, teaches that the power, which the Council acknowledges as belonging to the Church, is a power belonging to it in its own right, and that it was received from Christ, not from the civil Prince. This interpretation is directed against *Launoïus* and his followers, who, as MOSER remarks, o. c., p. 100, endeavoured to evade the Tridentine canon by contending that it « was not dogmatic, but merely disciplinary, and that by the « Church » one ought to understand kings and princes, as being leading members of it, whose name and authority the Church employs, when establishing matrimonial impediments ». Cf. what we shall presently say, towards the end of this n° 219.

2. This difficulty was raised in the course of the Council of Trent, on occasion of the decree of clandestinity, as Benedict XIV remarks, in his Apostolic Letter of 10 March 1758 (*Collectan.*, n° 1391) : « It was questioned at first whether the Church could do away with clandestine marriages, seeing that the lawful contract is at the same time the matter and form of the sacrament of marriage... whence several concluded : that when once the mutual transfer and acceptance of the conjugal right have lawfully taken place, the matter and form exist ; and these cannot be modified except by Him who is the Author of the grace conferred by the sacraments ». This is why the Tridentine Fathers, in order to avoid touching the matter and form of the sacrament, established the impediment of clandestinity by binding the contracting parties themselves, and rendering them incapable of contracting marriage otherwise than before the parish priest and two witnesses. See above, n° 63 ; ESMEIN, o. c., I, p. 78 ss. ; II, p. 159 ss.

then, as we have observed above in n° 216, by means of impediments place conditions for the validity of the contract, and so affect either the contracting parties, or the formalities of the act, without modifying the substance of the sacrament. It places conditions for the valid reception of the sacrament, but the substance of the latter remains altogether intact.

We may add that *the Church alone*, to the exclusion of the State, has this power of establishing impediments. This is a consequence of the first statement demonstrated above, viz., that the regulation of the whole of this question is reserved to the Church alone. Thus the State has not the right to establish even *purely prohibiting* impediments (1).

But, for the further question : *within what limits* has the Church the power of setting up matrimonial impediments, it will be well to keep these two principles in mind :

219b.
Within what
limits
matrimonial
impediments
may be set up.

1. The Church has the power of establishing impediments for its own subjects, not only with a view to *spiritual* good, whether private or public, but also with a view to *bodily and temporal* good. For, marriage is a mixed matter, affecting both spiritual and temporal well-being, and so, since the whole regulation of it belongs to the Church, it is the business of the Church to provide for both in its matrimonial legislation, considering what we shall have to say presently in n° 220.

Thus the Church has the power to set up impediments of age, consanguinity, affinity etc., even in the supposition that only temporal welfare requires it.

2. The Church has no power to impose impediments that infringe *the natural and divine law*. In particular, it must have regard for that innate right of marrying, which each one is recognised as having by the natural law ; as also for the spiritual

1. The teaching of *Perrone* and *De Angelis*, to whom may be added SCHNEICHER, O. C., p. 12 s., that the State has power to introduce, for Christian marriage, *impedient* impediments, was expressly reprobated by Leo XIII, in his letter to the Bishop of Verona, 8 Feb. 1893 : « No other power but that to which it belongs to determine the necessary conditions for the *licit* and valid celebration of marriage, either can or ought to pass judgment in the matter ». *Acta S. Sedis*, XXV, p. 462.

necessity of the soul which not unfrequently renders it imperative that one should marry.

This has special reference to the establishment of an *absolute* impediment, that is to say, one by which a determinate class of persons is forbidden to marry, or rendered incapable of marrying by an invalidating law, not only *relatively*, in respect of such or such a person, e.g., a relation by blood or marriage, but *absolutely*, in respect of any person whatsoever.

There are, indeed, cases in which that might lawfully be done by the Church ; but, apart from the case in which the prohibition or invalidation of marriage rests upon the spontaneous renunciation, made by one who takes a vow of chastity or of celibacy, or receives Orders, only quite exceptionally and for the gravest reasons could recourse be had to the aforesaid law exclusive of all marriage.

Two reasons of this nature might be admitted : the necessity of defending *the life and rights of a third person*, and the necessity of defending and vindicating *the common good of society*.

The former reason obtains in the case of those who are suffering from a contagious disease, e. g., leprosy or syphilis, in such a degree as to occasion danger of contagion *for the partner*. Under these circumstances, it seems that the social authority, for the protection of the life of the partner, might forbid, and that under pain of nullity, one so affected to marry, as long as the danger of contagion endures ; but such persons already have no right to marry with such great injury to a third person.

This reason of defending the rights of a third person could not be invoked in favour of the *prospective offspring*, that is to say, in such a way that the social authority, in order to safeguard the right of the child, would have the right of precluding from marriage those who are sickly, feeble, or suffering from a disease that is not contagious in respect of the partner, in order that sickly and defective children might not be born of such a union ; for, the child yet unconceived has no rights, and even for it, it is better to be sickly than not to be at all.

The latter reason might obtain in a case in which the Church judged that it was necessary for the common good that certain classes of persons should not be allowed to marry. For, the social authority has the power of restricting in its subjects

the use of liberty, as far as the safety of society requires it, either by punishing malefactors, in order that others may be deterred from crime, or by directly protecting society and defending it against evil-doers, who endanger its existence.

Thus a/ *by way of punishment*, certain persons who outrageously violate the sanctity of marriage might, perhaps, be excluded from marriage with a view to deterring others from such conduct and inducing them to observe the laws of marriage ; generally, however, it would be better to find some other way of restoring order and safeguarding the sanctity of marriage, lest its prohibition should turn to the ruin of the soul (¹).

Also b/, if it should happen that *the very safety of society* was endangered through the excessive number of the degenerate and vicious, and the disproportionate increase of defective and abnormal children, this might, perchance, be a reason why the social authority should forbid marriage to certain persons whose bodily or mental condition is such that, apart from the danger of contagion for the partner, it is evident that their offspring must be extremely sickly, feeble or defective ; as also to those whose intellectual and moral powers are so enfeebled that they are obviously unfit for the bringing up of children.

But again, recourse must not be had to such restriction of the liberty of marriage on these grounds, unless it is really certain that there is necessity for such a step ; but this will hardly ever be the case. For, as a rule, the number of degenerates is not so great as to endanger the safety of society, which is quite compatible with the existence of a certain number. Moreover, the children of a degenerate or vicious father are not always abnormal or vicious ; and, finally, the defects of an evil disposition or inclination contracted by birth, may be remedied by the manly and Christian education of the children, and by training them in the practice of virtue, whereby good habits are acquired. This remedial course is certainly to be preferred.

1. In former times, marriage was frequently forbidden by the Church *in poenam delicti*, as may be seen from nos 139, 140, 242 and 329 ; but it must be remembered that the faithful were at that time more effectively guarded against licentiousness and passion, by a more fervent faith and also by the various practices of prolonged penance to which offenders were condemned.

Taking all this into consideration, apart from the imminent danger of contagion for the partner, there will rarely be good ground for setting up a matrimonial impediment against degenerates and defectives, even within restricted limits ; but never could a law, which *universally and by a general statute* forbids or invalidates the marriage of *every* person who is diseased or in any way defective, degenerate or abnormal, be approved.

Conclusion. **Conclusion.** Christian marriage is under the jurisdiction of the legislative, judicial and coercive power of the Church alone ; not merely in all that concerns either the *conjugal contract, or the conjugal bond itself*, but also in all that is *intimately* connected with the conjugal bond, such as the *betrothment* ⁽¹⁾ that *precedes* it, and the essential and inseparable *effects* that follow it, namely, community of life, legitimacy of offspring, and paternal authority.

Note. Our thesis, in its various parts, is directed and it has been vindicated by the Church, in the first place, against the *Protestants* who, rejecting the sacramentality of marriage, regard it as an *entirely profane* and secular institution (as we have observed above in n° 96, and as we shall have occasion to remark again, below in n° 225b), and accordingly taught that the regulation of marriage ought universally and without any restriction to be exercised by the secular ruler ; and, in the second place, against the *civilists* and *regalists*, of the seventeenth and eighteenth centuries. They looked upon Christian marriage as a *civil-religious* institution, consisting of a twofold element, the sacrament and the contract, the contract being, in their eyes, of a civil and profane character ⁽²⁾. From this they argued that marriage ought to be

1. The proposition maintaining that betrothment, properly so called, constitutes a purely civil act preparatory to marriage, and subject in everything to the laws of the State, as if an act preparatory to the sacrament was not, as such, dependent on the ecclesiastical law, has been declared false... and prejudicial to the rights of the Church, by Pius VI in his Constit. *Auctorem Fidei*. See proposition 73 of Syllabus of Pius IX, already mentioned, DENZINGER, o. c., nos 1558 and 1774.

2. Thus *De Dominis*, the apostate, at one time Archbishop of Spoleto, in his work, *De Republica Christiana* (a. 1617), hardly falls short of the Protestant doctrine, and only hypothetically admits the sacramentality of marriage, and, admitting it, teaches that the power of the Church to regulate the marriage contract between Christians must be denied ; LAUNOIS, *De Regia in matrimonium*

regulated by the Prince, in so far as it is a contract, and by the Church, in so far as it is a sacrament ; so that it belonged to the civil ruler to establish impediments (at least invalidating impediments), as these directly affect the contract, and not to the Church, unless with the consent of the Prince (¹) ; cf. below, n° 226, where the evidences are given, and where it is shown how this civilist doctrine was practically applied in France and Austria, and how it prepared the way for the introduction of civil marriage. Our thesis is also directed, in the third place, against certain *Catholics*, who, with *Sanchez* and the *Salmanticenses*, thought, or even now think, that the exclusive right of the Church is not derived from the very nature of Christian marriage, but from a reservation made by the Church. We speak of this in n° 217.

II. RIGHT AND DUTY OF THE CIVIL AUTHORITY.

A. Its right.

1. The civil authority has the right to exercise its legislative, judicial, and coercive power, not over those points which we have just enumerated, but over the *purely civil effects* of marriage. These effects are neither essential to the conjugal bond, nor inseparable from it ; their direct and immediate concern is with the merely administrative and temporal province (²), viz., « the dowry ; the

220.
*Rights of the
civil author-
ity over the
marriages of
the faithful;*

potestate ; LE RIDANT, in his anonymous work, given in the Bibliography, p. 54-96 ; POTHIER, o. c., especially nos 11-22. The *Synodus Pistoriensis* (1786) also inclined to the same error, likewise *De Paula Vigil*, from whose work is taken the 68th condemned proposition of the Syllabus. Cf. supra, n° 216.

1. There were also authors who, admitting the distinction between the sacrament and the contract, concluded therefrom that diriment impediments could, *iure proprio*, be established at the same time by the *civil ruler and by the Church* ; they divided impediments into those affecting the contract and those affecting the sacrament. Thus, GERBAIS, o. c., especially p. 2-10, where he sets forth the state of the question ; likewise CARRIÈRE, o. c., I, p. 402 ss. ; BALLEST, o. c., p. 13-24.

LE RIDANT, however, laughs at this distinction of impediments (o. c., p. XV ss. and p. 56), and rightly so, since a diriment impediment cannot be understood as affecting other than the contract of marriage ; cf. also *Examen du pouvoir législatif...*, p. 169 ss. Add to this that duality in the regulation of one and the same marriage is impossible. To this impossibility we have appealed above, n° 216, in note, in opposition to the said authors.

2. BENEDICT XIV, *De syn. dioec.*, L. IX, ch. IX, n° 4.

rights of succession of married persons in respect of their parents, either as to their titles or property ; the respective possessions of the partners, their rights of succession to one another, and those of their children to their property and titles » (1).

« She (the Church) is not ignorant, and does not deny, that the sacrament of marriage, being instituted for the preservation and increase of the human race, has a necessary relation to events or duties in the life of man, which, though connected with marriage, belong to the civil order, and about which the State rightly inquires and decrees (2) ».

The State, therefore, can legislate with regard to these civil effects, and impose certain conditions, the neglect of which may deprive even valid marriage of such or such civil effect (3).

2. It can, moreover, take cognizance of *offences against public order* committed by Christians in their married life, and vindicate the law by the punishment of such crimes as adultery, incest and wife-murder. But it could not do so precisely in relation to the marriage, as, for instance, by forbidding or suspending the cohabitation of the parties.

3. Finally, the State has the right of *recourse to the Church*, and of demanding that it should, in its matrimonial legislation, and especially in the establishment or abrogation of impediments,

1. GASPARRI, O. C., n° 278 ; he adds : « Though married persons ought to assist one another, the amount of the property which the wife ought to bring her husband, i. e., the dowry, is not determined by the natural law, nor is it strictly necessary ; in like manner parents are bound to support and educate their children according to their position, but succession to titles of nobility depends on the civil law ; likewise succession to property can be at least modified by the civil law according to the requirements of society ». Cf. PALMIERI, O. C., p. 264.

2. Leo XIII, *Arcanum*. Further on he continues : « All ought to understand clearly that... the civil law can only deal with and settle those matters which spring from marriage in the civil order. » Again, in his letter to the Bishop of Verona, 8 Feb. 1893, he says : « It is well to call to mind that the civil power can set up and regulate the civil effects of marriage ; but all that concerns marriage itself must be left entirely to the jurisdiction of the Church ». *Acta S. Sedis*, XXV, p. 460 s. See also the letter, already mentioned, of Leo XIII to the Bishops of Peru, 16 Aug. 1898.

3. For example, the law can decree that the children of a prince shall not share their father's rank, unless their mother has the rank of princess. See *Morganatic Marriage*, n° 95.

take into consideration the circumstances and requirements of the faithful among those who are subject to its laws.

The Church, on its side, is always ready to show good will, as far as it can do so without contravening the divine or ecclesiastical law : « The Catholic Church, though she cannot in any way give up the duties of her office or the defence of her authority, is still very greatly inclined to kindness and indulgence, whenever they are consistent with the safety of her rights and the sanctity of her duties. Wherefore she... has more than once mitigated, as far as possible, the enactments of her own laws, when there were just and weighty reasons » (¹).

B. Its duty.

1. It is the duty of the State *to recognise as legitimate* the marriage *its duties, and what they are,* of Christians, validly contracted in accordance with laws of the Church, and it cannot deny to the same, in the civil courts, those effects which are inseparable from every valid marriage, particularly the legitimacy of their union as husband and wife, and the legitimacy of the children born of the marriage.

2. *As to the purely civil effects* which are separable from the marriage bond, and subject to the civil law, the State ought « to view the validity or invalidity of marriage in accordance with the decisions of the Church, and, in dependence on these decisions, which it does not fall within its province to make, to provide for the civil effects » (²).

Undoubtedly, in order that it may legally recognise canonically valid and lawful marriage, and give it its civil effects, it is necessary that the civil authority should have proof of the same, and it may therefore require for this purpose a certain formality, such as registration. It may also penalise the omission of this formality, but without going so far as to « consider marriage as valid and lawful before the lay courts, only from the time of its civil registration ». WERNZ, O. C., n. 83.

1. Leo XIII, *Arcanum*.

2. *Ibid.* See also the letter of Leo XIII, of 8 Feb. 1893 : « Let the same lay power recognise as true and lawful that marriage which was instituted by Christ, and is taught by the Church, and thence let it proceed to grant or refuse to the marriages of its subjects the effects of marriage in civil society ». L. C., p. 461.

3. Finally, the State has the duty of *assisting the Church* in the regulation of Christian marriage ; it ought to facilitate the observance of the canonical matrimonial legislation, and even, at the request of the Church, to bring legal pressure to bear upon its subjects ⁽³⁾. This good understanding between the two powers, and due subordination are most greatly to be desired ; the State as well as the Church has the greatest interest in the right regulation of Christian marriages. It is « good for both (powers), and of advantage to all men, that there should be union and concord between them ; and that on those questions which are, though in different ways, of common right and authority, the power to which secular matters have been intrusted, should happily and fittingly depend on the power which has in its charge the interests of heaven. In such an arrangement, and in such harmony, there is found not only the best condition for each power, but also the most opportune and efficacious method of helping men in all that pertains to their life here, and to their hope of salvation hereafter » ⁽⁴⁾.

Scholion I. To whom belongs in the Church the power of regulating the marriages of the faithful ?

221.
To whom belongs in the Church the regulation of Christian marriage.

The Sovereign Pontiff and general Councils enjoy a complete and independent power, legislative, judicial and coercive, over Christian marriage.

The Bishops, individually, cannot, under the existing discipline of the Church, exercise *legislative* power in the matter of marriage, and particularly they cannot set up impediments, either diriment or impedient ⁽⁵⁾.

They can exercise in the matter a *judicial* and *coercive* power, as judges of the external forum, but in dependence on the Holy See, which also reserves to itself certain matrimonial cases, such as those of royal personages, and of non-consummation.

Parish priests are not even judges of the external forum ⁽⁶⁾, and

1. Leo XIII, *Arcanum*.

2. Bishops have power in particular cases to forbid the celebration of a marriage, but solely for reasons based on law, so as not to make a new law, but simply to apply the existing law ; this is rather an exercise of the judicial and coercive than of the legislative power. Cf. BEN. XIV. *De Syn. dioc.*, l. VIII, c. 14, n° 5 ; see also below, where we speak of the *Church's Prohibition*.

3. *Collat. Brug.*, t. VI, p. 594 s.

so they cannot exercise legislative, or even judicial or coercive power. Their powers are confined to drawing up the cases to be laid before the Bishop, and to stopping a marriage provisionally. They cannot judicially decide matrimonial disputes.

Observe that the *Holy See* exercises its *judicial* power over marriage through the agency of the *Congregations and Tribunals specially deputed for this purpose*. Apart from the *S. Congr. pro negotiis Rituum Orientalium*, which has a certain power in the matter, it is to the *S. Officium* that belong matrimonial causes concerning the Pauline privilege and the impediments of *disparitas cultus* and *mixta religio*; other causes regard the *S. Congr. de disciplina sacramentorum*, whenever it is a question of *disciplinary* regulations, and the *S. Rota* in cases in which a *strictly judicial* course has to be followed (!). Finally, the *S. Poenitentiaria* deals with the settlement of all questions belonging to the *forum internum*. Cf. below, n. 341 et 351.

This distribution was made by the Constitution of Pius X, *Sapienti consilio*, of the 29 June 1908, to be found in the *Acta Ap. Sedis*, I, p. 7 ss., with which Constitution are connected various documents, viz., *Lex propria S. Rom. Rotae et Signaturae Apostolicae*, 29 June 1908 (A. A. S., I, p. 20 ss.) and *Regulae servandae apud Supremum Signaturae Apostolicae Tribunal*, of 6 March 1912 (A. A. S., IV, p. 187 ss.); *Ordo servandus in SS. Congregationibus, tribunalibus, Officiis Romanae Curiae — Normae Communes*, 19 June 1908 (A. A. S., I, p. 36 ss.) and *Normae Peculiares*, 29 Sept. 1908 (A. A. S., I, p. 59 ss.) (?).

Scholion II. Who are subject to the power of the Church?

1. Directly all baptized Christians exclusively, not only Catholics, but also non-catholics, are subject to it, unless specially exempted.

The reason of this is to be found in the baptismal character, which all baptized persons exclusively possess, and which is the

222.
All baptized
Christians,
and they only
are directly
subject to the
rule of the
Church in the
matter of
marriage;

1. On the distinction between the *disciplinary* course and the *judicial* course, cf. OJETTI, *De Curia*, n° 12 s.; MONIN, o. c., p. 177 ss.; *Collat. Brug.*, t. XIV, p. 285 s. Whether also matrimonial causes that specially belong to the *S. Officium*, if they are to be treated judicially, should be sent to the *S. Rota*, see below, n° 341.

2. Among the commentaries, see OJETTI, o. c.; DE MEESTER, o. c.; MONIN, o. c.; RUSSO, *La Curia Romana*, Palermo, 1901; CHOUPIN, apud *Etudes*, tom. CXVII; BESSON, in the *N. R. th.*, 1908 and 1909; SIMIER in the *Revue Augustinienne*, 1908, and other works mentioned in the *Collat. Brug.*, t. XIV, p. 281.

basis of the subjection. « It is beside the question to say that *heretics* are cut off and cast out by the Church, in consequence of the excommunication that they lie under, as corrupted members ; such a way of speaking merely means that they are out of the Church as far as participation in the common advantages of the faithful and in their suffrages is concerned. They are rather to be compared with deserters and rebels, who none the less remain amenable to the authority of their own rulers (1) ».

Rightfully, then, *heretics* are subjects of the Church both in the matter with which we are now concerned and in all other matters. Moreover, they are not *in the generality* of matrimonial causes relieved of this dependence, either by a general decree of the Church, or by a prescription or custom to the contrary, as FEYER shows at length, *De Matrimoniis mixtis*, p. 89 ss., where he brings forward a number of documents that explicitly declare that it is so (2). We say : *in the generality* of matrimonial causes, because,

1. VAN DEN BERGHE, *De Legibus*, Brugis, 1904, n° 105.

2. Among these documents, we must especially mention the Constit. of Benedict XIV, *Singulari nobis*. The Pope there speaks of a marriage contracted without a dispensation between a *Jew* and a *Protestant*, and says that it ought to be repeated : « for, the marriage at first contracted (before reconciliation to the Church) was entirely null, owing to a diriment impediment, called *disparitas cultus* ». It is a question here of an impediment established by ecclesiastical law only.

Again, in his celebrated Declaration of 4 Nov. 1741, Benedict XIV writes : « His Holiness declares that we must regard as valid such marriages (contracted clandestinely in Holland between heretics or between a heretic and a Catholic), *provided that there is not any other canonical impediment* ». *Collectan.*, n° 1420. See also the Const. *Magna nobis*, the Const. *Ad tuas manus*, and the letter to the Bishop of Breslau ; the Rescript of Pius VI to the Cardinal de Franckenberg and his letter to the Archbishop of Prague, etc. ; these documents are quoted with others by FEYER, l. c., p. 91 ss. Cf. also the Letter of Pius VII to the Archbishop of Mayence, in 1803 (in the *Acta S. Sedis*, VII, p. 62).

The same doctrine is again affirmed by the decr. of the S. C. C. of 18 Jan. 1663, ad 3^m, *Collectan.*, n° 1318 ; and by the Instr. of the C. S. O. of 20 March 1860, where we read : « for the unbaptized, it is necessary to examine the impediments of the natural law ; but for heretics, we must add thereto the impediments of the Church, to which they are subject ». *Collectan.*, n° 1297. See also the *Causa Parisien.* of 1903 (in the *Anal. eccl.*, 1903, p. 284 s.).

The quinquennial faculties ordinarily granted to Bishops afford us a final argument, viz., « dispensandi... in contrahendis et contractis, cum *hæreticis* conversis etiam in 2 simpliciter et mixto ».

by a special exception affecting the impediment of clandestinity, the Decree *Ne Temere* exempts from it heretics (that is to say, those who have not been baptized in the Catholic Church and have never been converts to Catholicism), who marry among themselves, and those who, in the German Empire or in the Kingdom of Hungary, contract a mixed marriage (1).

2. Indirectly, even *unbaptized* persons are subject to the matrimonial power of the Church, and on two grounds :

*unbaptized
persons
indirectly.*

a/ *by reason of the dependence of the baptized party*, with whom the unbaptized party wishes to contract marriage. For, the validity of the contract requires the ability of both the contracting parties, and consequently the inability which directly affects one of the parties, indirectly affects the other also (2).

b/ Unbaptized persons are subject to the matrimonial power of the Church on yet another ground : « there are certain bonds *contracted in infidelity*, which have no influence on the validity of the marriage as long as the state of infidelity endures, but which, *after conversion*, constitute a diriment impediment » (3).

Thus the decree of the C. S. O., of 26 Aug. 1891, declares « that *affinity* naturally contracted in the case of the unbaptized in consequence of sexual intercourse, whether licit or illicit, is not an impediment to marriage contracted in the state of infidelity, but becomes an impediment for marriage *contracted after the reception*

1. See above, nos 77 and 79.

2. Thus the impediment of *disparitas cultus* which directly binds the baptized person and renders him incapable of marrying an infidel, at the same time affects the latter indirectly. It is the same also with the impediment of consanguinity between the said persons to the fourth degree, and that of lawful affinity likewise to the fourth degree, and that of unlawful affinity to the second degree.

The same applies to the impediment of public decency (FEYE, *De Imp.*, n° 408), as also to that of *crimen*, under certain conditions. See FEYE, o. c., n° 458 ; DE BECKER, *De Matr.*, p. 195 ; and the decr. of the S. C., de P. F., 23 Aug. 1852, ad 2^m (*Collectan. de P. F.*, n° 1256). We have already said, in nos 77 and 79, that the same principle is applicable under the new regime introduced by Pius X, as concerns the impediment of clandestinity, saving the exception made for the German Empire and the Kingdom of Hungary. For the special condition of spiritual relationship in this matter, see below, nos 316, 317.

3. Cf. DE BECKER, *De Matr.*, p. 33.

of *Baptism*, whereby they become subjects of the Church, and consequently subject to its laws ». *Collectan.*, n° 1247 (¹). Observe, according to what we have said under letter a/, that the conversion of *one only* of the two parties is sufficient to annul the marriage of persons who have contracted this bond of affinity while in the state of infidelity.

On the other hand, the case of *public decency* between unbaptized persons is not an impediment to their marriage contracted after baptism (²), and it is the same with *crimen* (³). The impediment *crimen* rests on an offence that the reception of baptism is considered to remove entirely, so that no further account is taken of it.

Note. It is evident that *unbaptized* persons are bound by the impediments of the *natural* and *divine* law ; and, as the Church is the authoritative interpreter of both these laws, its declarations on the subject are also binding on the unbaptized.

223.

Form used by
the Church in
the exercise
of this power.

Scholion III. Form in which the Church exercises its power.

« The written form is that ordinarily employed by the Church in the establishment of diriment or impedient impediments ; nevertheless, there are several examples of impediments introduced by custom alone, for instance, that of *disparitas cultus* ». DE BECKER, *De Matr.*, p. 34. This author observes that custom might still have power to produce the same effect, though it would be difficult for it

1. See also the Instr. of the C. S. N., 16 Sept. 1824, *Collect.*, n° 1235, ad 2^m ; cf. the *R. Th. Fr.*, 1896, p. 574 s. ; the decr. of the S. C. de P. F. of 25 Aug. 1852, in the *Collectan.*, n° 1237 ; the decr. of the C. S. O., of June 1895, in the *N. R. Th.*, XXIX, p. 561 ; the decr. of the C. S. O. of 16 Dec. 1898, in the *R. Th. Fr.*, 1899, p. 195.

2. The C. S. O. explicitly declares this in the decree of 19 Apr. 1837 ; *Collectan.*, n° 1254. In the case proposed : « Titius, a pagan, married the pagan Maevia, but did not consummate the marriage ; after the death of Maevia he became a Christian. Can he marry Bertha, the sister or cousin of Maevia, who has abjured paganism and become a Christian ? Must we decide also, from this point of view, the question of betrothment between pagans, and that of marriage *ratum* ? ». The S. Congr. replied : « The impediment does not exist ».

3. The S. C. de P. F., on the 23 Aug. 1852, replied in the affirmative to the following question : « An infidel committed adultery with a married woman who was also a pagan, and under promise of marriage killed the husband with the consent of the wife. Can the guilty pair, after their conversion, marry one another ? ». *Collectanea*, n° 1256.

to possess all the conditions requisite for establishing an impediment with the force of law. See below, nos 289 and 292.

PARAGRAPH II. REGULATION OF MARRIAGE OF UNBAPTIZED PERSONS.

PROPOSITION. *We acquiesce in the opinion that holds that the supreme civil authority has the power of regulating the marriages of its unbaptized subjects, and of establishing even diriment impediments.*

224.
The regulation of marriage of unbaptized persons rests with the State :

Demonstration.

1. There is first *the argument from theological reason*, contained in the proofs which we have employed in the demonstration of the first proposition of paragraph 1. *the nature of marriage proves it;*

Marriage, apart from the sacrament, is not intrinsically and essentially sacred ; if it can be said that it is holy, because it tends to multiply the members of religious society and to educate them for the glory of God, it can also be said that it is secular, since it regards *quite as immediately* the well-being and increase of civil society. It is precisely this natural end of the matrimonial contract which constitutes the title and sanctions the power of the civil authority to regulate the marriage of the unbaptized ; and in this case there is nothing against the exercise of this right, since the higher right of the Church is not concerned with it ; for, the Church has no jurisdiction over those who are not of its fold.

Consequently, the regulation of marriage between unbaptized persons rests with the secular authority ; and this involves, subject to the divine and natural law, the setting up of impediments both diriment (1) and impeding, inasmuch as the arguments given above, in no 219, and drawn from the public welfare and social order, hold good no less for civil than for religious society.

2. There is also the argument **from authority**.

This opinion finds support in several documents of the Holy See, especially in the reply given by the S. C. de P. F., 26 June 1820 (2), and in the Instruction of the same Congregation, of the

1. Cf. WERNZ, o. c., no 77, where he shows that PERRONE is illogical in admitting that the State has the power to set up impeding but not diriment impediments.

2. See in the *Collectanea* of the S. C. de P. F., no 1447, the text of the decree, which declares null a marriage contracted in infidelity « without the observance

8 Oct. 1631, to the missionaries in India, regarding Indian polygamists (1). The reply and instruction of the C. S. O., of 20 Sept. 1854 and of 29 Oct. 1739 respectively, though commonly quoted and commented on in works on this subject (2), are really less important and convincing for our present purpose.

*it belongs to
the civil au-
thority, as
such.*

Corollary I. The regulation of marriage of unbaptized persons, and in particular the power of establishing impediments, belongs to the civil authority *as such*, and not as a trustee of the religious authority, though this latter opinion is held by LEHMKUHL, o. c., II, n. 727, and by PALMIERI, o. c., p. 279, compare p. 271 s.

Moreover, this power belongs to it *in its own right*, and not merely as a result of *circumstances*, as BILLOT thinks, o. c., II, p. 429, as if « in this case, the force of circumstances assigned to the only lawful authority in power, the office of safeguarding, as well as may be, the social welfare » (3).

of a ceremony, the omission of which, according to the laws of Tonquin, is held as a diriment impediment ». It is added that a new marriage may be contracted. But, as WERNZ says, o. c., n° 80, note 208, « the nullity of the marriage, with full liberty to contract another, neither was nor could be declared by the Cardinals without *certain proofs of law and fact* ; otherwise there would be a grave transgression of the divine law that established the impediment *ligamen* ».

To this decree is added an Instruction, quoted l. c. in the note, drawn up by the Consultor, and sent the following year ; though it is not certain that it was sent on behalf of the S. Congr. ; cf. on this subject RESEMANS, o. c., p. 71 ss. and 93. In any case the competence of the State is clearly affirmed : « Secular rulers, whether Christians or infidels, have complete power over the marriages of their non-christian subjects ; and, subject to the natural and divine law, they can establish impediments annulling such marriages not only as to their civil effects, but even as to the conjugal bond ».

1. « Indian polygamists who are converted to the faith together with all their wives and receive baptism, are bound to send away all such wives, with the exception of the first, who alone is the real wife, provided that the marriage has not been invalidated by an impediment of the natural law, or of the *positive law made by their secular ruler* ». GASPARRI, o. c., n° 287. This Instruction was certainly sent by order of the S. Congr., but rather as an opinion of theologians and canonists than as a decree of the Congregation.

2. Cf. DE BECKER, *De Matr.*, p. 40 s. ; GASPARRI, o. c., p. 286 ; RESEMANS, o. c., p. 81 ss. ; THEOL. MECHL., which has here changed its former opinion ; and especially WERNZ, o. c., n° 81 note 209.

3. PAOLI, o. c., p. 129-145 and LEITNER, *Lehrb.*, p. 24 ss., speak in the same sense,

Corollary II. We must not consider the power of regulating the marriages of the unbaptized, possessed by the civil ruler, as restricted to the limits laid down by *Zigliara* (1). According to him, the civil authority can only determine what the natural law in a less determinate way already requires, so that « the prescriptions of the civil authority do not bind of themselves, but only in virtue of the natural law ».

*Limits of
this power.*

With a view to temporal well-being, the regulating power possessed by the civil ruler can be exercised by him in respect of the unbaptized, as fully as that possessed by the Church (described in n° 219) in respect of the faithful. Like the Church, the Prince also cannot impose impediments that *infringe the divine and natural law*. This has special reference to the setting up of *absolute* impediments, by which the marriage of a subject, not otherwise disqualified, with any person is prohibited and invalidated (2).

1. Cf. MELATA, O. C., p. 20 and p. 28.

2. See what we have said above, in n° 219, from which it will be apparent that in some of the states of the United States of America the limits are greatly exceeded. A considerable movement exists there for promoting the selection of the human species, or the propagation of offspring sound in mind and body (known as *Eugenics*), to the exclusion of that which is vitiated and adulterated. Under this pretext, an attempt is being made to preclude from marriage those who, it is feared, may bring into the world children suffering from some hereditary taint.

In the state of *Michigan* the law declares every person suffering from *syphilis* or *gonorrhoea* incapable of contracting marriage. A like law exists in the State of *Utah*.

Epileptics and persons of *feeble or unsound mind* are prohibited to marry in the States of *Indiana*, *Minnesota*, *New-Jersey* and *Ohio*; also in the States of *Kansas* and *Utah*, unless the woman be over the age of forty-five.

In the State of *Ohio* no license to marry shall be granted, «where either of the parties... is an *habitual drunkard*... or who, at the time of making application for said license, is under the influence of any *intoxicating liquor* or *narcotic drug* ».

These various prohibitions to marry and others are all inserted in the code in force in the State of *Washington*: « No woman under the age of 45 years, or man of any age, except he marry a woman over the age of 45 years, either of whom is a common *drunkard*, *habitual criminal*, *epileptic*, *imbecile*, feeble-minded person, *idiot* or *insane* person, or person who has theretofore been afflicted with hereditary insanity, or is afflicted with *pulmonary tuberculosis*, in its advanced stages, or any contagions venereal disease, shall... intermarry or marry any other person within this State ».

See the described dispositions in *The Ecclesiastical Review Year Book*, Philadelphia, 1910; *Encyclop. Britannica*, V° *Marriage*, t. XVII; SCHULTE, *Eherecht*, l. c.

Practical
observation.

Corollary III. To judge of the validity of a marriage contracted in infidelity, it is necessary to take into consideration the diriment impediments that the parties may have been under, *according to the civil laws of their own country*. Nevertheless, as, on the one hand, the opinion given above is not absolutely certain, and, on the other hand, it is difficult to distinguish clearly between the diriment and impeding impediments of the various legislations, the question must not be decided without previous recourse to the Holy See (¹).

225a
The regula-
tion of marri-
age between
a baptized
and an unbap-
tized person
belongs to the
Church alone.

Note. 1. It is a controverted point whether a marriage between a baptized and an unbaptized person is subject *only* to ecclesiastical regulation and impediments, or whether, in the case of the unbaptized party, those of the civil authority must also be taken into consideration.

For our part, we adopt the opinion of RESEMANS, o. c., p. 2 ; WERNZ, o. c., p. 94 s., and GASPARRI, o. c., in his edition of 1904, n° 306, against that of VAN DE BURGT-SCHAEPMAN, o. c., n° 48 ; DE BECKER, *De Matr.*, p. 44, and D'ANNIBALE, *Summula*, III, p. 294 ; and hold that the regulation of such marriages *belongs exclusively to the Church*, so that, in judging of their validity, there is no need to take into consideration the provisions of the civil law, even with regard to the unbaptized party.

Our reason for this is, that according to what we have said above, it is not possible that the same marriage should be at the same time subject to the regulations of two independent and distinct authorities (²) ; consequently, when the occasion arises,

1. Cf. DE BECKER, *De Matr.*, p. 43 ; he rightly remarks : « In this matter it is necessary to proceed with prudence, first seriously inquiring if the civil law is in conformity with the natural and divine law, and moreover, if the legislators intended, at least implicitly, to establish a law or prescription binding in conscience. It may be that they had no intention of legislating about the marriage bond itself, but only about the temporal and civil effects and consequences of marriage ». Moreover, where it is a question of a new colony, like the Congo, for instance, which has just received a new code of laws, the sufficient promulgation of the same will often be open to doubt, and it may be a question if the law obliges in a particular case in which its observance was practically impossible. See SALSMANS, o. c., p. 12 s.

2. See above, n° 216. We said there that it was possible that the Church and State might require for the validity of the contract formalities that mutually excluded one another. It is useless to try to set aside this argument by pleading that, under the circumstances, one would only have to apply the principle or

the law of the State ought to yield to the higher law of the Church.

2. The regulation of the marriage of unbaptized persons by the civil authority does not involve, as we have seen, any power to dissolve the conjugal bond, contrary to what we have said in nos 31 and 32 with regard to the contract of betrothment.

Scholion I. On the right of the State to sterilise certain of its subjects.

225b.
The right of
the State to
sterilise its
subjects.

With the question mooted above, in Corollary II, taken in conjunction with what has been said in n° 219, is intimately connected a controversy that has lately come to the fore, regarding the power of the State to prevent certain degenerate, abnormal, defective and criminally inclined persons from bringing children into the world, not only by setting up a diriment impediment against such persons, but also by enacting that they shall be *surgically sterilised* by the operation of *vasectomy* or *fallectomy* (¹).

Laws to this effect have already been passed in some of the states of the United States of America, viz., in Indiana (²), Utah, Connecticut and California. The controversy has also raged in many periodicals (³) and the

privilege of the communication of exemption; for, it might well happen that the respective powers might be so strict in their requirements as to leave no room for the exercise of the privilege in question.

1. Cf. the description given above, in n° 143, and observe that in the operation of vasectomy, as performed on a man, a severance is made of the vas deferens only, and not of the funiculus spermaticus; for, care is taken to preserve intact the nerves, veins and arteries surrounding the vas deferens. See the description of the operation given by Dr O'MALLEY, *Eccles. Review*, vol. XLIV, p. 687 ss., and by GEMELLI, *La Scuola Cattolica*, vol. XXI p. 403 ss. The controversy is confined solely to vasectomy, i. e., as performed on the man.

2. In that State, according to Dr O'MALLEY, *Eccles. Review*, vol. XLIV, p. 684, the operation of vasectomy, from 1907 to the end of 1910, was performed on about 800 men.

3. The following articles have reference to this subject: DONOVAN (professor in the Franciscan College attached to the University of Washington), *On the lawfulness of a certain surgical operation*, in the *Ecclesiastical Review*, vol. XLII (1910), p. 271 ss., cf. *ibid.*, p. 599 ss., also vol. XLIV, p. 571 ss., and vol. XLV, p. 313 ss.; LABOURÉ (professor in the Seminary in San Antonio), *On Vasectomy*, *ibid.*, vol. XLIII, p. 80 ss., cf. pp. 320 ss. and 552 ss., likewise vol. XLIV, p. 574 ss. and vol. XLV, p. 355 ss.; RIGBY (professor in the Dominican College, Rome), *On the lawfulness of vasectomy*, *ibid.*, p. 70 ss.; SCHMITT, *Vasectomia, eine neue Operation und ihre Erlaubtheit*, in the *Zeitschrift für Kath. Theologie*, 1911, p. 66 ss. and 579 ss.; compare with *Ecclesiastical Review*, vol. XLIV, p. 678 ss. and vol. XLV, p. 88 ss.; FERRERES, *De Vasectomia duplici noviter inventa*, in the *Razon y Fe*, t. XXVII, p. 374 ss.; GEMELLI, (Doctor of Medicine and professor of Pastoral Theology), *De licetate Vasectomiae*, in the *Scuola Cattolica*, t. XXI (1911),

wish has been freely expressed that the American practice may be extended to other countries (¹).

We have no hesitation in saying that such laws are to be reprobated, and that the State has no right to enact the performance of the above-mentioned operations by public authority.

We prove this thus :

Vasectomy involves *a serious mutilation*, even if it be alleged that it does not induce impotency (²) ; for, this operation, however light it may seem in itself, deprives a man of the physiological function of fecundation.

Now the social authority cannot impose a serious mutilation on its subjects, except, in conformity with what has been said in n° 219, with regard to the restriction of the liberty of marrying, in so far as that is necessary, either 1. for the safeguarding of the life or rights of individuals, or 2. for the salvation of the common good of society, and that either by punishing delinquents, or by directly defending and protecting the safety of society against evil-doers who endanger it. Observe here, that recourse cannot be had to mutilation, except where no other and milder measure is available, and so the amputation of an organ is not permissible, where it is clear that the restriction of the use of the same is sufficient.

But 1. recourse cannot be had to vasectomy *for the protection of the life and private rights of a third party*, e. g., against persons suffering from a contagious disease, lest they should bring *the partner* into grave danger, or against those guilty of assaulting women ; for, other efficacious means, preferable to mutilation, are available, such as preventing them from marrying (n° 219), or, if need be, depriving them of their liberty.

Nor can the State resort to vasectomy for the protection of the *right of the offspring*, so that it may not come into existence weakly and defective ;

p. 396 ss. ; STUCCHI, *ibid.*, p. 417 ss. ; ESCHBACH, *ibid.*, t. XXII, p. 243 ss. ; CAPELLO, *ibid.*, p. 246 ss. ; DE BECKER, *The Casus « de licetate Vasectomiae »*, in the *Eccles. Review*, vol. XLII, p. 474 s. and vol. XLIII, p. 356 ss. ; O'MALLEY (Doctor of Medicine), *Vasectomy in Defectives*, in the *Eccles. Rev.*, vol. XLIV, p. 684 ss., and compare vol. XLVI, p. 219 ss. ; IDEM, *Inseminatio ad validum matrimonium requisita*, *ibid.*, vol. XLVI, p. 322 ss. ; WOUTERS, *De Vasectomia*, in the *Nederl. Kath. Stemmen*, 1911, p. 19 ss. Lastly may be mentioned the Theological Consultation of Fathers VERMEERSCH, DE VILLERS and SALSMANS, in the *Eccles. Review*, vol. XLVI, p. 475. See also the discussions held in the first *International Eugenics Congress* (24-30 July 1912), celebrated in London by the *Eugenics Education Society*.

1. Cf. *Zeitschr. f. k. Theol.*, 1911, p. 66 s., and *Razon y Fe*, t. XXVI, p. 374 s. ; cf. also t. XXVIII, p. 224 ss., t. XXXI, p. 495 ss. and t. XXXII, p. 222 ss., and compare with *Eccles. Rev.*, vol. XLVI, (1912), p. 207 ss.

2. Whether vasectomy induces *impotency* in a man, and that *perpetual*, see below, n° 276.

for, as we have already observed above, the child that has as yet no being, has no rights, and for the child itself, it is better that it should be weakly and defective, than not be at all.

2. As regards *the common good of society* :

a/ Vasectomy cannot be imposed by the State *as a penalty and punishment*. For, considering the comparatively painless nature of the operation, vasectomy lacks the *penal character*, and this is proved by experience, since many have, by their own free choice, submitted themselves to the operation (¹). Moreover, if vasectomy were imposed *as a punishment*, its application would have to be restricted to delinquents and criminals strictly so called.

b/ Vasectomy is not a *necessary means* for the *direct protection and defence of the safety of society against evildoers*, where it is a question of depriving defectives and criminals of the power of fecundation, lest the great number of defective children should imperil the very existence of society.

For, here especially holds good what we have said in n° 219, namely, that society is not endangered by a certain number of defective children, which, in a State otherwise well regulated, will always be comparatively small. If, however, danger should arise from this, it could be met in other ways ; by preventing such persons from marrying, or, if that cannot be otherwise effected, by putting them under restraint and depriving them of their liberty. Moreover, evil dispositions that children may perchance have inherited from a defective father, may, to a great extent, be remedied by a manly and Christian education (²).

Our thesis, therefore, stands ; and we find that most authors who have treated this question are in agreement with it (³).

1. Dr O'MALLEY, in the *Ecclesiastical Review*, vol. XLIV, p. 699 s., compare with p. 742, and also with SCHMITT, in the *Zeitschr. f. k. Theol.*, 1911, p. 76.

2. GERRARD, *The Catholic Church and Race Culture*, in the *Dublin Review*, vol. 149 (1911), p. 63 ss.

3. DE BECKER, *Eccles. Review*, vol. XLII, p. 474 s. and vol. XLIII, p. 356 ss. ; VERMEERSCH, SALSMAANS, DE VILLERS, *ibidem*, vol. XLII, p. 475 ; SCHMITT, *Zeitschr. f. k. Theol.*, l. c., and *Eccles. Rev.*, vol. XLIV, p. 679 ss. and vol. XLV, p. 80 s. ; FERRERES, *Razon y Fe*, XXVII, p. 378 s. and XXVIII, p. 224 ; RIGBY, l. c. ; Drt. O'MALLEY, *Eccles. Rev.*, vol. XLIV, p. 699 ss. ; WOUTERS, l. c. ; N. R. *th.*, l. c. ; STUCCHI, l. c., p. 479 ; CAPELLO, l. c., p. 247 s. ; ESCHBACH, l. c., 243 ss. ; GERRARD, l. c., p. 58 s. ; Rev. Father KEATING, the opinion of whom is quoted in *The Universe*, of 2 August 1912.

The guild of St. Luke, in a meeting held in Liverpool, 24 July 1912, expressed the same opinion, by emitting unanimously the following resolution : « That in our opinion, the proposals to sterilise the mentally defective members of the

If the State were recognised as having the power to make and enforce a law of this kind, it is obvious that it would afford an opening for grave abuses, and there would be reason to fear that, before long, vasectomy would be employed as an instrument of human selection, similar to that made use of in the case of cattle ⁽¹⁾.

Note. The question as to how far vasectomy may be permitted and performed by *private authority*, is treated at considerable length in the *Collat. Brug.*, t. XVII, p. 543 ss. The following is a summary of it: considering the good effect observed in those of an erotic disposition: viz., on the one hand, the preservation of erectability and activity in the glands of the sexual organism, without any atrophy of the testicles; and, on the other hand, the diminution of seminal secretion, and so of cerebral congestion also, and of the sexual erethism consequent on it, it seems that the operation of vasectomy may be permitted in the case of a one who is abnormally and pathologically erotic, for, it is then considered to make immediately for the good of the whole body, and for this, mutilation is permissible.

225c.
The teaching
of
Protestants.

Scholion II. The teaching of Protestants ⁽²⁾.

Luther and his followers teach that marriage is a purely secular contract, and consequently solely dependent on the civil authority: » Since wedlock is altogether a secular and outward thing, like wife and child, house and home, and so on, it is dependent on the supreme government » ⁽³⁾.

According to them, therefore, it belongs to the State to prescribe strictly

community are opposed to every principle of human right and human liberty, and we condemn them universally. In our opinion the solution of the problem is to be found in attacking the causes of mental deficiency which lie in the defects of our social organisation; in dealing with the education of those mentally defective on Christian and elementary lines; in preventing by segregation in suitable cases the multiplication of the unfit; and in the judicious use of the influence of the medical man in directing attention to the dangers attending the marriage of mentally defective persons and in discountenancing them ». *The Universe*, August 2, 1912.

On the other side are LABOURÉ, *Eccles. Review*, vol. XLIII, p. 80 ss., 320 ss., vol. XLIV, p. 574 ss., vol. XLV, p. 88 ss. and p. 355 ss.; likewise, with a restriction, DONOVAN, *Eccles. Rev.*, vol. XLII, p. 271 ss., p. 599 ss., vol. XLIV, p. 571 ss. and vol. XLV, p. 313 ss. The same thesis has been vindicated at the *Eugenics Congress*, of which we have just spoken, namely by Dr. DAVENPORT, Director of the *Eugenics Record Office* of the United States.

1. Cf. Dr. O'MALLEY, *Eccles. Rev.*, vol. XLIV, p. 705; SCHMITT, *Zeitschr. f. k. Th.*, 1911, p. 66 s. and 77; DONOVAN, *Eccles. Rev.*, vol. XLV, p. 317 s.

2. We refer in particular to the Protestants of Germany.

3. *Realencyckl.*, XXI, p. 862; FRIEDBERG, *Das Recht*, p. 159 s. and 198. This power of the lay ruler is admitted even by Protestant authors who recognise the sacred nature of marriage, like SOHM, *O. C.*, p. 2.

requisite formalities, to establish impediments, and to determine the causes of dissolution of the bond, subject only to the divine and natural law ; consequently this theory admits the validity and legitimacy of all marriages that comply with the civil regulations, provided that they do not infringe the natural and divine law ; while, on the other hand, all marriages that are civilly unlawful, are unlawful also in conscience.

Nevertheless, the Protestant Church, though declaring itself incompetent in principle, does in fact interfere in the question of marriage by enforcing respect for its theory. Thus :

1. It prescribes for its members certain *religious formalities*, but tenders them as sanctioned by the civil law. Before the introduction of civil marriage, these formalities were generally required for the validity of the contract ⁽¹⁾ ; but, since that time they serve only for the ecclesiastical recognition of the marriage, and for the official registration of the contract already valid before the civil law and canonically considered as such ⁽²⁾.

2. It has also its own *impediments*, but they do not possess the true characteristics of matrimonial impediments, especially of diriment impediments, unless sanctioned by the divine law or by the civil authority. Apart from these two exceptions, marriage contracted under a canonical impediment is regarded by it as valid ; the only effect is, that a minister of religion cannot bless such marriages, and it is hoped in this way to deter believers from them ⁽³⁾.

It has, moreover, so to speak, established its matrimonial law on the lines of the civil law, especially in Germany ; and it has barely kept one or two particular impediments, e. g., *disparitas cultus*, which it has succeeded in maintaining under the penalty of which we have just spoken ⁽⁴⁾.

3. It has likewise its particular causes for *dissolution* of the bond ; but here again it only insists on respect for the natural and divine law in the causes of dissolution admitted by the civil authority, and declares unlawful and without effect divorces pronounced contrary to the divine and natural precepts. In other respects it shows itself accommodating, and follows the State in its laxity with regard to divorce. Cf. the *Realencyckl.*, t. XXI, under *Scheidungsrecht* ; ROEDENBECK, o. c., p. 129 ss.

4. Finally, the Protestant Church has its ecclesiastical tribunal, the consistory, which decides religious matrimonial causes in accordance with the principles mentioned above.

1. *Realencyckl.*, V, p. 203 s. ; FRIEDBERG, *Das Recht*, p. 272 s., 300-305 ; SOHM, *Das Recht*, p. 254 and 267 s.

2. *Realencyckl.*, V, p. 206.

3. *Ibid.*, p. 298.

4. *Ibid.*, p. 211 s.

Note. Though it is the only logical one, all Protestants do not admit this theory of the purely declaratory value of their religious marriage. Some of them, like Sohm and Roedenbeck, in conformity with their opinion as to the nature of marriage in the Protestant law (see above, at the end of n° 60, in note), consider the religious ceremony as a constituent element of marriage. From their point of view, the civil marriage is merely an inceptive union, a simple consensual contract, to be perfected by a real and effective possession, which takes place by means of the religious formalities (¹).

Cf. SOHM, *Das Recht*, p. 284-314, especially p. 289 s.; *Trauung und Verlobung*, p. 146 s.; ROEDENBECK, o. c., p. 34-37; FRIEDBERG, *Verlobung und Trauung*, p. 70-78, is of a contrary opinion; likewise EBELING, p. 62 s. and 66-68. Consult also VERING, o. c., p. 881 s., WERNZ, o. c., n. 207, note 345.

SUPPLEMENT I

ECCLESIASTICAL REGULATION OF MARRIAGE AND ITS HISTORY.

226.
*Historical
phases.*

*The Church
by degrees
acquired the
sole regula-
tion of
Christian
marriage;*

First Period (²).

In the first centuries of the Christian era, marriage was considered by the civil power as a purely secular contract, and was treated as such. The lay authority regulated it, made laws for it, and exercised jurisdiction over it independently of the ecclesiastical power.

Side by side with civil marriage, there was religious marriage, the only true one in the eyes of the faithful. This was governed by the laws of the Church (³). Thence arose a *dualism*, a twofold and distinct legislation and jurisdiction, giving rise to frequent conflicts between the civil and ecclesiastical courts. These conflicts the Church endeavoured to avoid as far as possible, partly by conforming its law to the law of the State, whose prescriptions it adopted and sanctioned (⁴), and partly by striving to bring the civil law to respect the law of the Church (⁵).

1. DIECKHOFF, o. c., p. 296-320, advances an opinion that takes a middle course between the other two.

2. This historical notice has special reference to Belgium.

3. Cf. SCHNITZER, o. c., p. 40. Thus S. JEROME, in *Epistola LXXIII ad Oceanum* says: « Aliæ sunt leges Cæsarum, aliæ Christi; aliud Papianus, aliud Paulus noster præcipit », in MIGNE, t. XXII, p. 691.

4. Cf. KÖSTLER, o. c., p. 73-76; SCHNITZER, o. c., p. 41 s., collato cap. 1, Dist. X, and below, n. 250.

5. This is how so many prescriptions of the canon law came to be inserted in the civil law. Thus, if the Church borrowed some of its earlier matrimonial laws

Second Period. *Stage of transition to exclusive regulation by the Church.*

Under the impulse and influence of the Church, the civil law sanctioned and adopted more and more the prescriptions of the canon law, so as to become in complete agreement with it.

In spite of this agreement, the canon and civil law remained distinct, and each had its separate court; but by degrees it came to pass that all matrimonial causes were brought before the ecclesiastical judges only, and, when the parties did not appeal, the civil authority abided by their decisions. Thus these causes were gradually withdrawn from the civil jurisdiction, and in the end only the ecclesiastical courts were considered competent.

The weakness of the royal power in the presence of the growing authority of the Church greatly favoured this development, and thus from the tenth century begins the

Third Period. *Exclusive regulation by the Church, (X-XV cent.).*

At this epoch the Church enjoyed to the full its integral power, both legislative and judicial, over the marriages of the faithful; moreover, in consequence of the weakness of secular rulers, there were brought before the ecclesiastical courts not only matrimonial causes properly so called, that is to say, such as concern the marriage bond and its inseparable effects, but even, during a certain time, those causes that relate to the purely civil effects, and naturally belong to the lay courts.

Fourth Period. *Interference of the Civil Power (XV-XVIII cent.).*

The interference of the civil authority was at first purely practical, respecting, and legally recognising the exclusive competence of the Church; but gradually it came to be admitted in law.

1. Practical interference.

The heads of the State began by resuming their right to regulate the purely civil effects, and of judging matrimonial causes under this aspect. Gradually they overstepped these limits, and usurped authority in the matter of marriage, beginning with the judicial power and finally arrogating to themselves the legislative power.

a/ With regard to the *judicial* power: under pretext of passing judgment relative to the purely civil effects, they endeavoured, at first, insidiously to

but the State successively usurped jurisdiction over marriage:

a) by way of practical interference;

from the ancient Roman law, the later Roman law in its turn took many of its provisions from the Church. Cf. TROPLONG, o. c.; LAURIN, o. c., p. 261 s.; KÖSTLER, o. c., p. 69; BERNARD, o. c., p. 71. To take but a single example, the impediment of affinity in the collateral line was unknown to the ancient Roman law, but it was borrowed at a later period from the canon law, as CARON very well shows, o. c., p. 61 ss.

take cognizance of causes that concerned the conjugal bond itself ⁽¹⁾; then, by means of the so-called « *appel comme d'abus* », they interfered in a multitude of causes already decided, or awaiting decision before the ecclesiastical courts ⁽²⁾.

b/ With regard to the *legislative power* : they issued a number of decrees on marriage, the greater part in conformity with the canon law, though some were in opposition to it, under the pretext that certain canonical provisions infringed the Gallican liberties, or appeared incomplete. Such were the various decrees promulgated in France with regard to clandestine marriages ⁽³⁾, or those contracted without parental consent ⁽⁴⁾. This interference showed itself at first only in practice ; theoretically the civil authority recognised the exclusive competence of the Church, both in the judicial and in the legislative order ⁽⁵⁾ ; it was only indirectly and surreptitiously that the State actually usurped a share in the regulation of marriage ⁽⁶⁾.

b) by way of
judicial
interference,

2. Judicial interference.

But, at a later date, the so-called *civil* or Gallican theory claimed judicially, and as its proper right, practical interference on the part of the State, by drawing a distinction between the sacrament and the contract, and treating this as a civil contract ⁽⁷⁾.

1. Cf. LEMAIRE, o. c., p. 22 ; ESMEIN, o. c., p. 36-42 ; LAFOURCADE, o. c., p. 196 ss. ; DUMAS, o. c., p. 55 ; KISSELSTEIN, o. c., p. 511 ss.

2. KISSELSTEIN, *ibidem*.

3. LEMAIRE, o. c., p. 49 ss. ; DESFORGES, o. c., p. 124 ss.

4. BERNARD, o. c., p. 106-147.

5. Cf. DESFORGES, o. c., p. 124 ss.

6. Thus in the case of « *appel comme d'abus* » the public authorities did not settle the causes as if they had been illegally decided, but referred them to some other ecclesiastical authority.

Thus again in the civil prescriptions requiring parental consent, BERNARD, o. c., p. 13 s. and p. 135 s., shows how the kings of France prohibited at first under different sanctions marriages contracted without this consent, not for the purpose of thwarting the legislation of the Church, or of passing laws in opposition to it, but in order to supply the omissions of the Canons, while fully respecting the validity of the conjugal bond recognised by the Church. Even in the sequel, when they had decreed the nullity of such marriages, they still endeavoured to justify their action by maintaining that such unions were canonically invalid on account of the impediment of *raptus*. See below, n° 250 ; PLANIOL, o. c., I, n° 1060 ; LAFOURCADE, o. c., p. 187 ; DESFORGES, o. c., 143 s. ; VAN-TROYS, o. c., p. 209-304.

7. See above, n° 219. But observe this twofold constituent element of the civilist doctrine : the distinction of the contract from the sacrament, and the civil character of the former. The sole distinction between the contract and the

According to this theory, marriage comprises two elements : the *contract*, which is of itself *civil*, and the *sacrament* ⁽¹⁾. Consequently the civil ruler has a perfect right to claim, not an exclusive, but a partial authority over marriage, i. e., over the contract, but ought to leave to the Church the regulation of the sacrament. The Gallican authors who defended this theory therefore attributed to the king the power to regulate marriage *as a contract*, and to set up impediments to the matrimonial *contract*. They acknowledged, however, that the Church had the power of regulating the sacrament, but not the contract, and they accordingly denied to it, in fact, the power of setting up impediments, at least diriment impediments, since these cannot directly affect the sacrament, but only the contract ; and therefore ecclesiastical impediments had no effect upon the nuptial *contract*, except in so far as they were sanctioned and adopted by the civil authority ⁽²⁾.

There was, however, as yet no question of *civil marriage*. The State still regarded marriage as a *civil-religious* act, civil by reason of the contract, religious by reason of the sacrament connected with it ; it consequently considered that the two powers ought to take part in the regulation of it, and that in the celebration of marriage, it was necessary to take into account the twofold regulation, the civil and the canonical ⁽³⁾.

sacrament, according to Billuart and Melchior Canus, does not justify, as we have observed above, n° 216, the conclusion of the Gallicans as to the power of the Prince of regulating the *marriage contract*.

1. This distinction can be understood in different ways. Nütz considers it as adequate, Melchior Canus as inadequate ; Billuart maintains, and POTHIER appears to follow him, that the contract constitutes the whole of the sacrament and serves as its base, but can nevertheless exist without it.

2. « Le mariage n'étant soumis à la puissance ecclésiastique qu'en tant qu'il est sacrement, et n'étant aucunement soumis à cette puissance en tant que contrat civil, les empêchements que l'Eglise établit, seuls et par eux-mêmes, ne peuvent concerner que le sacrement, et ne peuvent seuls et par eux-mêmes, donner atteinte au contrat civil. Mais lorsque le prince, pour entretenir le concert qui doit être entre le sacerdoce et l'empire, a adopté et fait recevoir dans ses Etats, les canons qui établissent ces empêchements, l'approbation que le prince y donne rend les empêchements établis par ces canons, empêchements dirimants de mariage, même comme contrat civil ». POTHIER, o. c., n° 20.

3. POTHIER, o. c., n. 19, says : « Le mariage étant contrat et sacrement, s'il est, en tant que contrat, soumis aux lois séculières, il est, en tant que sacrement, soumis aux lois de l'Eglise ». According to the Gallicans, marriage between Christians, celebrated in conformity with the secular laws, was valid as a contract, but still imperfect and incomplete, even before the civil law ; it was necessary that it should be raised by the Church to the dignity of a sacrament. This is why, they said, the Kings of France, wishing that the marriage of Catholics should be perfect in every respect, required as a condition for validity of the contract that

Fifth Period.

until the
introduction
of civil
marriage.

The French revolution introduced obligatory *civil marriage*, and completely usurped the regulation of it, to the entire exclusion of the Church. We shall now speak of this in supplement II.

 SUPPLEMENT II

CIVIL MARRIAGE.

227.
Meaning of
civil
marriage.

Civil marriage may be said to be any marriage whatever that is regulated by civil authority, i. e., that is subject to the legislation and jurisdiction of the State, whether celebrated with religious formalities recognised by the State, or with simply civil formalities.

Generally, however, the term, civil marriage, is reserved for that which is not only regulated by the civil authority, but is also civilly celebrated, without the intervention of any religious body, as if it were something merely profane ; while that marriage which, though regulated by civil authority, is nevertheless celebrated with religious solemnities, and as such is recognised as valid by the State, is still commonly called *religious marriage*, though the marriage is not, in the strict sense, religious except in so far as it, at the same time, remains subject to the regulation of the religious authority.

Civil marriage may exist under various form :

1. Under the *obligatory form* (*Zwangs-ehe* or *obligatorische Civilehe*), where imposed indiscriminately on all who wish to be regarded as married before the civil law and treated as such. If they wish also to be united before the Church, they are free to do so, but the State recognises no effect in the religious ceremony, and regards it as a private matter producing no effect ; in certain countries it is unlawful to go through the reli-

it should take place before the priest ; he was at the same time, in the eyes of the civil law, the minister of the contract, acting in the name of the king, and the minister of the sacrament, acting in the name of the Church. Portalis himself says : « Anciennement le mariage était célébré devant le propre curé des parties, qui était à la fois ministre du contrat, au nom de l'Etat, et ministre du sacrement, au nom de l'Eglise ». Cf. also the celebrated letter of the Chancellor de Pontchartrain, of 1712, in FRIEDBERG, *Das Recht*, p. 549 s., in note.

The civil marriage was not even that which was introduced into Austria under Joseph II, in 1783 ; it was rather a practical application of the civilist doctrine, that we have described. Cf. FRIEDBERG, o. c., p. 142 ss. ; ESMBIN, o. c., I, p. 45 s. ; *Apologie du mariage chrétien*, and compare with what has been said above in n° 219.

gious ceremony before the civil marriage has taken place. This is civil marriage wholly secularised.

2. Under the *optional form* (*Facultative Civilehe*), where people are free to marry either with the civil or religious form, and both the one and the other are admitted as valid by the civil authority.

3. Finally under the form of *Nothcivilehe*, i. e., where the State admits civil marriage as lawful for those only who do not possess religious marriage, such as infidels, atheists and dissidents, or for those who are incapable of contracting a religious marriage ; while all others are bound to go through the religious form of marriage ⁽¹⁾.

The regime of obligatory civil marriage was introduced into France by the Legislative Assembly in 1792, but the ground had been prepared for it long before. We shall speak in the first place of this preparation, and then of the introduction of civil marriage. We shall then briefly describe and criticise the matrimonial legislation of Belgium, and afterwards draw our conclusions.

228.
*Historical
phases
in France :*

I. THE PREPARATION.

1. The real **cause** that brought about the introduction of civil marriage was the *Philosophism* of the eighteenth century, and, going back to an earlier date, *Protestantism*. These two errors in particular gave rise to the idea of secular marriage entirely dependent on the State ⁽²⁾, that takes its practical form in civil marriage.

*Cause of the
introduction
of civil
marriage,
and the
circumstances
that
favoured it.*

2. **Two circumstances** favoured its introduction. The one, *theoretical*, was the diffusion of the civilist doctrine of marriage, distinguishing between the contract and the sacrament ; the other, *practical*, was the establishment of civil marriage for Protestants, in virtue of the celebrated royal decree of 1787.

The civilist theory, especially in view of the doctrines of the seventeenth century, readily permitted the conclusion that the State could ignore the sacrament, and confine itself to the single element of the contract, abstracting from the other ; but abstraction easily led to negation.

Undoubtedly the Gallican theory did not logically imply civil marriage ; the distinction between the sacrament and the contract, even if this were said to be of a civil character, did not compel one to say that marriage is a purely civil contract ; and this is why we do not say that this theory was the *cause* of the introduction of civil marriage. But it rendered more easy the

1. Cf. HOLLWECK, o. c., p. 39-42, who makes a distinction between *relative* and *absolute* Nothcivilehe.

2. See the doctrine of Luther and Calvin, given above in nos 56, 96 and 225b ; HOLLWECK, o. c., p. 6 s. ; BÖCKENHOFF, o. c., p. 113.

transition made under the influence of philosophism, and the defenders of the civilist doctrine found themselves disarmed in the face of this development ⁽¹⁾.

The edict of 1787 was issued to avoid the inconveniences of the existing law ⁽²⁾, which obliged Protestants, like other people, to marry before the Catholic parish priest. The edict permitted them to contract marriage without any religious form and without the presence of the Catholic priest ; they were able to marry in their own way, provided the parties made a declaration before the parish priest or the civil judge for the purposes of legal proof ⁽³⁾.

This was far from being the secularisation of marriage, or the regime of civil marriage strictly so called and obligatory. The State still considered marriage as a religious, or rather as civil-religious contract, as we have

1. How much better would they have been able to resist the philosophers, who endeavoured to destroy the sacred character of marriage, had they been in a position to urge against them the true Catholic doctrine, and to vindicate the identity of the contract and the sacrament ! As LEMAIRE says, *o. c.*, p. 98 : « Alors que les protestants niaient le caractère sacramentel du mariage, alors que les philosophes niaient même son caractère sacré et religieux, il eût fallu une doctrine de tradition ferme, une théologie solide et résistante, c'est-à-dire tout le contraire de ce qu'était le Gallicanisme. Si donc nous n'accusons pas la doctrine Gallicane d'avoir été la source directe du mariage civil, nous disons formellement qu'elle en a favorisé l'avènement d'une façon extraordinaire. Elle n'a pas donné le mariage civil à la France catholique, mais elle a livré la France catholique au mariage civil ».

2. Cf. PLANIOL, *o. c.*, I, n° 845 s.

3. The situation of the Protestants before the edict of 1787 was truly inextricable. On the one side, since the revocation of the Edict of Nantes (1685), their religion had been proscribed in France, and all subjects were in law presumed to be Catholics ; moreover, the law recognised for marriage only the form of the Council of Trent, requiring the presence of the Catholic parish priest. On the other side, the Catholic parish priests refused to admit Protestants to marriage, as they regarded it as a profanation of the sacrament. It was, therefore, impossible for Protestants to contract a marriage that was legally valid, unless they became converts to Catholicism. In fact, for the most part they simulated conversion. Others went abroad to marry, or « au désert », as they said, that is to say, they went to the secret and retired places where they held nocturnal meetings with their co-religionists, and where the Protestant minister officiated at the marriage. But these marriages had no legal value, and those who contracted them ran the risk of prosecution ; moreover, if the parties lived as husband and wife under these conditions, they were liable to the penalties enacted against concubinage. The whole of this question is treated at length in BONIFAS, *o. c.*, p. 92-170, and DESFORGES, *o. c.*, p. 183-243.

already observed. If it required on the part of Protestants only the simple fulfilment of the civil formalities, this was but a concession rendered necessary for the regularising of their position before the civil law ; it was a kind of *Nothcivilehe*. But the way was nevertheless opened by it, and it afforded a sample of civil marriage which, at a later period, was to become binding on all ⁽¹⁾.

Thus these two circumstances, of which we have just spoken, prepared the ground theoretically and practically ; as Lemaire says, o. c., p. 89, « The Gallican doctrine was the theoretical antecedent of civil marriage, and the edict of Louis XVI the practical antecedent ».

3. The form of transition from the Gallican doctrine to the idea of civil marriage is apparent in the text of art. 7, tit. II, of the French Constitution of 1791 : « La loi *ne considère* le mariage que comme contrat civil ».

Though they distinguished the one from the other, the Gallicans took both elements into account conjointly, and taught that marriage ought to be regulated by the two powers at the same time and concordantly. The constitution of 1791 does not deny the sacramental character of marriage, it even recognises it implicitly ⁽²⁾, but it *abstracts* from it ; it ignores it, and declares that it is necessary to legislate in the matter of marriage as if it were a purely civil affair, *without troubling about* its sacred character. A little later we shall find that marriage is called a purely civil contract, and its sacred character *denied*.

II. THE INTRODUCTION OF CIVIL MARRIAGE.

Civil marriage, in its obligatory form, was introduced by the Legislative Assembly in 1792. Carrying out art. 7 of the Constitution, it decreed that marriage should be civilly contracted by all citizens, *as a purely civil contract*. Far from limiting itself, like art. 7 of the Constitution, to an *abstraction* from the sacred character of marriage, the Assembly *denied* it absolutely,

Circumstances under which it was introduced

1. « La nouvelle déclaration de mariage instituée par l'Edit de 1787 ne peut être regardée comme l'inauguration du mariage civil... ; elle n'est que la consécration inconsciente du Gallicanisme. Seulement... la forme en laquelle elle se trouve ainsi consacrée est telle, qu'elle pourra servir presque sans changement pour le mariage civil ». LEMAIRE, o. c., p. 89 ; see also BASDEVANT, o. c., p. 181, who quotes the words of *Durand de Maillane*.

2. The text originally proposed was rejected ; it reads : « La loi *ne reconnaît* le mariage que comme contrat civil ». Durand de Maillane, who drew up article 7, still adhered to the Gallican theory, which maintained the sacred character of marriage ; his words, quoted by BASDEVANT, o. c., p. 177-180, bear witness to this. As we shall state later, the terms of the clause requiring the precedence of the civil formalities speak in the same sense.

and recognised in the nuptial contract only the character of a purely secular contract. This is clear from the declaration of Muraire, the promoter of the law ⁽¹⁾, and from the text of the law ⁽²⁾, no less than from the whole of the subsequent legislation on marriage, which, as we have seen, sanctioned the principle of the dissolubility of marriage at the will of the contracting parties, just as in the case of other civil contracts.

Nevertheless, the reformers did not go so far as to exclude the parallel existence of canonical marriage. Before the civil courts, civil marriage was sufficient, valid and complete in itself, independently of any sacred character (and in this they went beyond the Gallican idea and the formula of the Constitution) ; but they left Catholics free to contract another marriage before the Church, and recognised their right not to consider civil marriage as valid in conscience.

They thereby recognised and introduced in the case of Catholics a twofold marriage, parallel and independent : the one, civil, for the civil forum, and the other, religious, for the forum of the Church and of conscience. This was *dualism* ⁽³⁾.

In the sequel, the pseudo-legislators of 1795 and 1797 went further. They endeavoured to exalt and solemnize civil marriage in such a way as to make it take the place of religious marriage even for Catholics. Their object was to depose the religious contract, and so secularize marriage completely. For this purpose, by the laws of 1795 and 1797 (3 Brum. de l'an IV and 13 Fructidor de l'an VI), they instituted various solemnities and ceremonies for the celebration of civil marriage, to take the place of the religious ceremonies ⁽⁴⁾. Subsequently, however, those who drew up the *Civil Code* thought it better to return to the law of 1792 ; on the one hand, they retained the purely civil marriage, with its exclusively secular celebration devoid of all sacred character, but, on the other hand,

1. Cf. LEMAIRE, o. c., p. 98.

2. *Ibid.*, p. 104, where the preamble of the law of divorce is given.

3. Thus one and the same person, e. g., a Catholic, would have to contract a distinct twofold marriage in order to be lawfully married in the eyes of the State and of the Church.

4. For the details, see LEMAIRE, o. c., p. 108-112. See also p. 102, where he observes that, in 1792, Gohier had unsuccessfully made a similar proposition to the Legislative Assembly. And yet at the present day, in the midst of our Catholic population, there are *officiers d'état civil* who make themselves ridiculous by reviving these ceremonies ! Cf. the *Bien Public*, 29 Feb., 5 and 7 March 1908.

they did not exclude the parallel existence of another marriage for Catholics (1), independent of the former (2).

Note. 1. In many countries matrimonial legislation and jurisdiction, in respect of Christians, have been usurped by the civil power, and the regulation of marriage has been taken away from the religious body. Civil marriage, however, is not everywhere in force in its obligatory form, but in many places religious celebration is recognised, so that civil marriage prevails only in its optional form or in its *Nothcivilehe* form.

229.
*Regulations
in force in
other coun-
tries.*

Thus, a/ civil marriage *in its obligatory form* (*Zwangcivilehe*), together with the dualism that flows from it, exists not only in Belgium, but also in many other countries : in Holland (3), Germany (4), Switzerland, Hungary (1895), Italy, and in most of the South American States (5).

b/ In other countries there exists the *facultative Civilehe* (optional civil marriage), so that each can choose between the two forms of marriage. This is the case in England (6), and in many of the North American

1. It seems that even Portalis, who was one of the principal persons engaged in the drawing up of the Code, was at one time borne towards the Gallican theory or rather towards the formula of the Constitution of 1791 : marriage constituted by the contract, dependent on the State, and by the sacrament, of which the State should take no account. He appeals to this theory, as we shall presently say, to vindicate the precedence of the civil marriage. Cf. also LEMAIRE, o. c., 11 s. ; ALLÈGRE, o. c., p. 117 s. ; FRIEDBERG, *Das Recht*, p. 549 s., p. 567 s.

2. The clause requiring the precedence of the civil marriage (see below) does in fact restrict this independence, but it was not the intention of the legislators to injure it.

3. Cf. SCHAEPMAN, o. c., p. 9 s.

4. HOLLWECK, o. c., p. 9 s., shows the historical phases of civil marriage in the different countries of Germany before the establishment of the Empire ; also its introduction under the Empire, by the law of 6 Feb. 1875, and its sanction in the new Code of 1900.

5. « En Amérique la contractation obligatoirement civile du mariage a été introduite dans les Etats principalement catholiques suivants : Mexique, 1884 ; Chili, 1884 ; Uruguay, 1885 ; République Argentine, 1888-1889 ; Brésil, 1890 ». ROGUIN, o. c., p. 142.

6. We are speaking of England only, apart from Ireland and Scotland, which each have their own legislation. Thus in Scotland two kinds of marriages are admitted, regular and irregular. Cf. LEHR, o. c., p. 231 s. ; ALLÈGRE, o. c., p. 120 s. ; this author makes mention also of *Gretna Green* marriages.

In England, for a long time prevailed the regime of religious marriage in the strict sense, in that religious solemnization before an Anglican minister (from

States (1).

c/ Elsewhere there exists the *Nothcivilehe* ; and there some are limited to the religious marriage, others to the civil, while others again can choose between the two. This state of things exists with various modifications in Norway, Sweden, Denmark (2) and Austria (3).

2. In some places, particularly in Europe, the regime of religious marriage understood in the strict sense, still flourishes at the present day, at least in the case of those who belong to the established religion, so that religious solemnization is not only admitted and acknowledged by the State, but the entire legislation and jurisdiction are also left to the religious authority.

This is the case in Russia, Servia, Montenegro and in some of the provinces of the Austrian Empire, viz., in Croatia and Slavonia, and in Bosnia

1836-1837, before ministers of other religions also) was not only sanctioned by the State, but the entire legislation and jurisdiction in the matter of marriage were left in the hands of the Anglican Church.

But from the year 1857, matrimonial jurisdiction was transferred to the civil courts, and the legislation itself *de facto* (if not *de jure*) is in the hands of Parliament, by which, contrary to the statutes of the Anglican Church, divorce *a vinculo* was introduced in the said year 1857 ; and, in 1907, the impediment of affinity, in the first degree of the collateral line, was abrogated, in so far as the marriage of a widower with his deceased wife's sister was declared valid, while, in other respects, the provisions and impediments of the matrimonial law of the Anglican Church were preserved in the civil law. Cf. GALICHET, o. c., p. 140 ss.

Religious solemnization is, however, retained, at the choice of the parties, before a minister of the Anglican religion or of some other religion. Such minister is recognised as having an official civil status (that of registrar), so that marriage celebrated before him, in a legally recognised place, is, ipso facto, valid before the civil courts. Up to the present, Catholics have not taken advantage of this privilege conferred by the Act of 1898. The practice with Catholics is to celebrate the religious marriage in a « licensed building », and then to repeat the form of civil marriage in the presence of the registrar (in the said « licensed building »), and sign the register together with the officiating priest and the witnesses.

1. SCHULZE, *Eherecht*, 1. c., p. 754-760, describes the legislation of the Federated States.

2. See ROGUIN, o. c., p. 120 ss. This author deals rather with the regime in force in the Scandinavian countries under the head of *Facultative Civilehe*.

3. LAURIN, *Introd. in jus matrimoniale*, p. 125 s., cf. p. 97 s. ; HOLLWECK, o. c., p. 9 ; *Th. Pr. Quartalschr.*, 1909, p. 500 ; SCHEICHER, o. c., p. 5 et 335 s. See also below, n° 232, in note.

and Herzogovina ⁽¹⁾. This regime is most fully in force in Spain, where its completely religious character is preserved in the marriage of Catholics, and the entire canonical legislation is recognised by the State ; while civil marriage is there available for non-catholics only ⁽²⁾. Cf. below. n° 232. A like regime existed in Portugal, before the recent revolution ⁽³⁾.

On the subject of these different regimes, see ROGUIN, o. c., p. 116-152 ⁽⁴⁾; HERGENRÖTHER-HOLLWECK, o. c., n° 1015 ; VERING, o. c., p. 875 ss. ; SÄGMÜLLER, o. c., p. 540 ss. ; SCHNITZER, o. c., p. 52 ss. ; LEITNER, *Lehrb.*, p. 84 s. We may observe that civil marriage was first introduced in its obligatory form (but not permanently) in England in 1653. In Holland and Frisia the optional form was already in existence in 1580 ; people could choose between the presence of the civil officer and that of the Protestant minister ⁽⁵⁾.

III. BELGIAN LEGISLATION ON CIVIL MARRIAGE.

A. Form of celebration.

The formalities required for validity in the celebration of civil marriage have already been described above in nos 83 and 243, together with the changes recently introduced by the law of 7 Jan. 1908.

B. Precedence of civil marriage over religious marriage.

The provision relating to the precedence of the civil formalities over the religious was proposed for the first time by the promoter of art. 7 of the

230.
Provisions of
the Code
Napoleon, and
especially of
the Belgian
Code, on civil
marriage,
in particular
as regards the
law of
precedence.

1. LEITNER, *Ne Temere*, p. 91.

2. Before Spaniards can be civilly married, they must make a declaration that they do not profess the Catholic religion. In connection with this required declaration difficulties have recently arisen, and an attempt has been made to have it abrogated. Cf. *Études*, t. CXI, p. 46 s.

3. ROGUIN, o. c., p. 391 s.

4. The author, on p. 151 s., speaks of the curious legislation in Roumania, which requires both the civil and religious marriage ; in virtue of the constitution, the fulfilment of the civil formalities must be followed by the nuptial blessing : « La bénédiction religieuse est nécessaire pour le mariage, sauf les cas qui seront prévus par une loi spéciale ».

5. FRIEDBERG, *Das Recht*, p. 481 ss. The law passed on the 1 April 1580, on the one hand, granted a concession to Catholics, who were no longer, as previously, compelled to marry before the Protestant minister ; but, on the other hand, it introduced civil marriage and made it obligatory for them, since for religious marriage they could only apply to the Reformed Church, which they could not conscientiously do.

Constitution of 1791. The Gallican idea, as we have seen, regarded marriage as a civil contract which was subsequently perfected by the sacrament ; and though the law entirely abstracted from the sacramental character, it was nevertheless logical from the Gallican point of view, to forbid the nuptial blessing before the civil contract ⁽¹⁾.

But the law of 1792 cut short the question of precedence. It instituted purely civil marriage, deprived of all sacred character, having no need of any religious ceremony to perfect it, and completely independent of, and distinct from the religious marriage that Catholics could contract if they wished. Neither the law of 1792, nor the worse one of 1795, made any regulation on this point ; it simply did not exist for them.

But the clause requiring the precedence of civil marriage was introduced in the *Concordat*, in the organic article 54 ; and later, in 1810, the Penal Code, art. 199 and 200, enforced it under severe penalties. This step was determined by *motives of practical expediency*, and especially by the fear that existed that a large proportion of married persons would content themselves with the religious marriage, and thus give rise to many anomalies in determining the civil status of citizens ⁽²⁾. Moreover, there were at the time many priests and Bishops even, who were of the same opinion, and demanded the precedence of civil marriage ⁽³⁾.

This law is the one at present in force in *Belgium* ⁽⁴⁾, in virtue of art. 16 of the Constitution ⁽⁵⁾, and every infraction of it is liable to heavy penal-

1. Durand de Maillane, in the face of the opposition raised against it, afterwards withdrew his original proposal.

2. We may add that Portalis, though in fact influenced by these reasons of expediency, undertook to justify this provision, the illogicalness of which he fully understood, by reviving the old Gallican theory of the contract-sacrament, which logically led to the precedence of the contract over the nuptial blessing. Cf. FRIEDBERG, *Das Recht*, p. 567 s. ; BASDEVANT, o. c., p. 200 and 204 ; HÉBRARD, *Les articles organiques*, Paris, 1870, p. 285 s. ; DELASSUS, o. c., p. 7 s., who observes that this theory was also invoked in the *Exposé des motifs* of art. 199 and 200 of the Penal Code.

3. LEMAIRE, o. c., p. 116, in the note.

4. It is the same, in general, in the other countries in which civil marriage exists, with the exception of Italy and Chili. For the legal provisions of Hungary, Germany and the Netherlands, as well as the penalties under which the precedence of civil marriage is enforced, see BALOG, o. c., p. 9 s., 25 s., and 35 s. respectively. On page 22 ss., the author adds that the Swiss Code, which comes into force in 1912, preserves the law of precedence, but suppresses the penalties which heretofore accompanied it.

5. « Le mariage civil devra toujours précéder la bénédiction nuptiale, sauf les exceptions à établir par la loi, s'il y a lieu ».

ties (1). Nevertheless the text of art. 16 provides for the legislative introduction of exceptions; this was the object of the law of 3 Aug. 1909, relative to marriages *in extremis*, proposed by M. Woeste and duly passed (2).

On the subject of this article and the discussions provoked by it, read HUYTENS, o. c., I, p. 587-621 and II, p. 466-472. On the one side, its defenders could allege little but theoretical principles; and their main contention was that, without this obligation of precedence, many would neglect the civil formalities altogether and confine themselves to the religious marriage, which, as they said, has been proved by experience. On the other side, many Catholics objected to the penalties imposed, as an infringement of liberty, but nevertheless, in a spirit of conciliation, acquiesced in the precedence, relying upon the exceptions which the law makes possible. Cf. *Coll. Brug.*, t. XIII, p. 517 s., where we have briefly explained the discipline formerly in force under the Dutch domination and under the provisional government; see also the *Revue cath. des Institutions et du droit*, 1903, t. 31, p. 136 s.; LECLER., *Coll. Namurc.*, t. IX, p. 254 s.; STANDAERT, *Collat. Gandav.*, IV, p. 62 ss.

1. *Code Pénal Belge*, art. 267: « Sera puni d'une amende de cinquante francs à cinq cents francs tout ministre d'un culte, qui, hors les cas formellement exceptés par la loi, procédera à la bénédiction nuptiale avant la célébration du mariage civil.

En cas de nouvelle infraction de même espèce, il pourra, en outre, être condamné à un emprisonnement de huit jours à trois mois ».

The *interpretation* of this law, having regard to the existing jurisprudence, calls for the following observations. *Primo*, according to the declaration made in the Senate by the minister of Justice, De Lantsheere, 20 July 1909, on the occasion of the discussion of the law of 3 Aug. 1909, the words « bénédiction nuptiale », both in the Constitution and in the Penal Code, « visent tous les cas où la présence d'un prêtre est nécessaire pour rendre valable un mariage religieux » (*Annales Parlem.* — Sénat, Session de 1908-1909, p. 587). *Secundo*, to constitute the offence, the purely passive assistance of the priest is sufficient, such as was until recently given in the case of a mixed marriage (*Pandectes Belges*, under *Acte de mariage*, n° 47, compared with the decision of the Trib. d'Anvers of 9 March 1876, with that of the Trib. de Bruxelles of 16 Nov. 1876 and that of the Cour de Cassation of 26 Dec. 1876; in the *Pasicrisie*, 1876, p. 97 and 1877, p. 21 and 41, in the case of M. Sacré, Dean of Antwerp). *Tertio*, under art. 66 and 67 of the Penal Code, co-operation in the offence is also punishable; and it was on this head that the Dean of Antwerp was condemned for having delegated his curate (*Ibid.*); read also the speech of the minister before the Chamber of Representatives, 27 Nov. 1908 (in the *Annales*, p. 142). Cf. LECLER, *Coll. Namur.*, t. IX, p. 256 s.

As regards the *application* of the penalties, the priest may benefit by the *condamnation conditionnelle*. Cf. *Coll. Brug.*, VII, p. 133.

2. The occasion of the introduction of this law was the recent conviction of M. Van Langenhove, vicaire at Overboelaere, who had officiated at a marriage

The following is the text of this new provision : « *Article unique.* L'art. 267, paragr. 1^{er}, du code Pénal est modifié comme il suit : Sera puni d'une amende de cinquante francs à cinq cents francs, tout ministre d'un culte qui procédera à la bénédiction nuptiale avant la célébration du mariage civil.

Cette disposition ne sera pas applicable lorsqu'une des personnes qui ont reçu la bénédiction nuptiale était en danger de mort, et que tout retard apporté à cette cérémonie eût pu avoir pour effet de la rendre impossible (1) ».

In the case of France, it may well be asked if the new regime of separation has not modified the respective positions of civil and religious marriage. On this subject, cf. the *Revue Augustinienne*, 1906, t. IX, p. 424 s. ; *Le Can. contemporain*, 1906, p. 641 s. ; the *Revue d'Apologétique*, t. X (1910), p. 539 s. ; DELASSUS, o. c., p. 12 s. ; PLANIOL, o. c., I, n° 850.

IV. CRITICISM OF THE BELGIAN CIVIL LEGISLATION.

A. The legislation in force is objectionable.

1. In the institution of obligatory civil marriage.

231.
The Belgian
civil legisla-
tion is objec-
tionable, both
in the institu-
tion of civil
marriage,

The law sanctioning obligatory civil marriage is objectionable on many grounds. It is enough for us to say that it is entirely untrue to the nature of Christian marriage, lowering it to the status of a purely lay and secular formality, and that it introduces a ridiculous dualism. This latter point is very well put in light by LEMAIRE, o. c., p. 189 : « It is impossible to base a nation's conception of marriage upon the idea that, in order to marry it is necessary to marry twice. Legislation and the law have their understandings with morality that the good sense of the people and practical morality know nothing about. Why say *yes* in the church, and then *yes* in the mayor's office, or why *yes* in the mayor's office and then *yes* in the church ? We cannot get away from this twice uttered *yes*, the one of import, the other of no import at all ». This dualism logically leads to endless conflicts between the law and conscience ; marriages null in conscience are declared valid in law, and vice versa (2).

in extremis, on the 4 Oct. 1907. See the *Exposé des motifs*, in the *Documents Parlementaires*. (Chambre des Représ., 1907-1908, n. 134) ; *Collat Namurc.*, t. IX, p. 257 ; *Collat. Gandav.*, IV, p. 61 s.

1. *Moniteur Belge*, 1909, n° 224, p. 4441. We have given a brief commentary on this provision in the *Coll. Brug.*, t. XV, p. 99 s., cf. t. XIII, p. 514 s. See also below, n° 401 ; *Collat. Gandav.*, IV, p. 67 ss.

2. Cf. LEMAIRE, o. c., p. 128-135, who makes the following observation on page 130 : « Dès lors qu'il n'y a pas harmonie entre la réglementation du mariage religieux et celle du mariage civil, et que cependant il y a obligation de respecter l'une et l'autre, la première par devoir de conscience, la seconde par prescrip-

2. In the clause requiring precedence.

Though this clause, as we have said, was not introduced in a spirit of hostility to the Church and religious marriage, it has nevertheless greatly contributed to the spread of the popular opinion that the civil marriage is of more importance than the religious, and that the latter is only an incidental ceremony ⁽¹⁾. Moreover, it is altogether illogical and opposed to liberty ; and, in fine, the reasons of expediency that have been alleged are of no value, at least at the present time. And in fact :

and in the
clause requir-
ing prece-
dence.

a/ This clause is *illogical*, even granting the principle of civil marriage together with the regime of separation and the mutual independence of the two courts. Even our opponents admit this ⁽²⁾.

b/ It is *opposed to liberty*. It may very well happen that there are urgent reasons for being married in the sight of God, when the parties concerned are so situated that they cannot first go through the civil form of marriage, either because of some impediment from which the State cannot dispense, or because of circumstances which do not permit of the necessary delay ⁽³⁾.

tion légale, il en résultera, dans toutes les circonstances où cette double satisfaction ne sera pas possible, un tiraillement douloureux, un pénible conflit, dont les parties sont les victimes ». See also HOLLWECK, o. c., p. 43-77 ; he gives a complete criticism of obligatory civil marriage.

1. Read the eloquent letter of Leo XIII to the Bishop of Verona against an analogous law of which there was question (8 Feb. 1893), in the *Acta S. Sedis*, XXV, p. 459 s. ; see also LEMAIRE, o. c., p. 147 ; DELASSUS, o. c., p. 3 and 4, where are given the words of Pius IX in his Allocution to the Belgians, 3 Oct. 1875, and in his Brief of 15 Jan. 1876.

2. « De deux choses l'une », exclaimed *Bathie*, as far back as 1867, « ou le mariage religieux n'est rien aux yeux du législateur, et alors pourquoi les articles 199 et 200 du Code pénal, qui érigent en délit un acte de religion ? Ou le mariage religieux est un fait important, et alors pourquoi le code civil n'en tient-il aucun compte ? Il faudrait choisir entre les deux partis. Que le mariage religieux soit non existant pour la loi civile, et existant pour la loi pénale, c'est une contradiction manifeste ». LEMAIRE, o. c., p. 122 ; he also quotes, on p. 124, the words of LAURENT. Cf. also the remarkable words of *Dr. Van Kaay*, quoted by SCHAEPMAN, o. c., p. 21 s. The *Chronique* of 7 March 1908, and the *Peuple* of 29 March 1908, speak to the same effect. We have given their testimony in the *Coll. Brug.*, t. XIII, p. 519.

3. This is by no means a gratuitous hypothesis ; on the contrary, such cases are of frequent occurrence, quite apart from marriages *in extremis*. The patent proof of it is to be seen in the reports published by the Society of Saint Francis Regis. Sometimes it is the parents who refuse their consent ; sometimes it is the authentic acts concerning the act of duty, or the decease of the former partner, that are wanting ; sometimes, again, it is not possible to fulfil in time the required formalities on the part of foreigners who wish to get married in Bel-

There is then a violation of liberty, and this was recognised by many members of the Congress itself (1830-1831) (4).

c/ Finally, *the reasons of practical expediency*, which were formerly invoked, no longer exist in the present state of affairs. All, even the uneducated, know of the advantages provided by the law, and they would take care not to forfeit them by neglecting the civil formalities (5). Moreover, confusion in civil status is no longer possible, for we are now far from the time when the parish priest, in officiating at a marriage, acted at the same time as the civil officer, in the name of the King (6).

B. The remedies.

232.
How the evil
consequences
of the law
might be
remedied.

1. The radical remedy would be to reform the matrimonial legislation on the lines of the Catholic principles set forth above, in such a way that the State should continue to regulate the marriages of its unbaptized subjects, and leave to the Church the exclusive regulation of marriages between

gium; for, according to the requirements of the Hague Conference, such contracting parties must conform to the laws of their own country as regards their right and ability to marry. Cf. *Coll. Brug.*, t. XV, p. 105, where we treat the question at length.

1. Cf. the *Exposé des motifs* de M. Woeste, in justification of his proposal of the law mentioned above.

2. « En wie er in den aanvang ook al onpoozel genoeg wezen mocht, om de burgerlijke huwelijksvoltrekking te verzuimen, de allertreurigste gevolgen van zijn verzuim zouden hem alras tot die burgerlijke huwelijksvoltrekking nopen, en de andere zouden zich uit louter eigenbelang wel wachten zijn verkeerd voorbeeld te volgen ». SCHAEPMAN, o. c., p. 13 s.

3. Formerly, and precisely on account of the recent introduction of the change in the law, it was possible to allege the likelihood of this confusion with some show of truth; and *Portalis* does not fail to say: « Les ministres qui procèdent aux cérémonies religieuses d'un mariage, sans qu'il leur ait été justifié de l'acte de mariage reçu par les officiers de l'état civil, compromettent évidemment l'état civil des gens simples, d'autant plus disposés à confondre la bénédiction nuptiale avec l'acte constitutif du mariage, que le droit d'imprimer au mariage le sceau de la loi était naguère dans les mains de ces ministres ». But now, as *La Chronique* says, l. c., « le temps a passé, on sait que le prêtre ne peut conférer le caractère légal à l'union de l'homme avec la femme »; and *Le Peuple* says, l. c., « chacun sait pertinemment à quoi s'en tenir sur la valeur respective des diverses formes du mariage ».

Besides, if the reason was good, if there was really need to see that certain married people did not live as such without civil marriage, the law ought also to prevent all concubinage, as De Gerlache said very pointedly before the National Congress (HUYTTENS, o. c., p. 590). And finally, if there was reason to fear some abuses, the timely intervention of the Bishops would suffice to prevent them.

Christians. The law would rightly require that the civil authorities should be duly informed of the religious marriages that took place, so that it might be enabled to recognise the married parties as such, and give to their union its civil effects.

Thus, in *Spain*, the Church regulates the marriage of Catholics, both as to impediments and the formalities of its celebration ⁽¹⁾. The civil law prescribes the observance of the form of the Council of Trent or that of Pius X, and for the civil authentication, it ordains, in art. 359 : « The municipal judge or other functionary of the State must be present at the canonical celebration of a marriage, in order to insure its immediate registration in the civil register ». As to ecclesiastical judgments in the matter of marriage: « The judgment is entered in the civil register and presented to the ordinary tribunal for the purpose of obtaining its execution as far as its civil effects are concerned » ⁽²⁾. On the other hand, the law determines the civil formalities to be observed by those who do not profess the Catholic religion. See LEMAIRE, o. c., p. 188-230 ; LEHR, o. c., p. 160 s. ; *Coll. Brug.*, t. XII, p. 274.

Having regard to circumstances, the Church would be able to tolerate, as it does in Spain, that the civil form prescribed by law should be applicable to those of the faithful who are unwilling to conform to the matrimonial legislation of the Church, so that their marriages might not be deprived of formality and left to the caprice of individuals ⁽³⁾.

Without being so radical and so conformable to the exposed principles on the regulation of marriage, the remedy would already prove efficacious if our laws adopted a regime analogous to that which, as we have seen, is in force in England and in several States of North America : viz. that the State, though reserving to itself the regulation of marriage, would recognise the legality, in the civil forum, of the religious formalities to be fulfilled in the celebration of marriage between Catholics. The crying anomaly of the two consents, which we have pointed out in the preceding number, would directly disappear.

2. But if the spirit of the times does not permit us to hope for such a satisfactory solution, some remedy at least ought to be afforded for the evil consequences that flow from the obligatory precedence of the civil marriage :

1. « The conditions, form and solemnities for the celebration of canonical marriage are regulated by the provisions of the Council of Trent, admitted as laws of the realm... The cognizance of cases of nullity or of separation, where canonical marriage is concerned, belongs to the ecclesiastical courts ». Art. 358 and 364, in the first part. The Spanish Government, consistent with itself, has also officially promulgated, as a law of the realm the Decree, *Ne Temere*. DOMAICA, o. c. p. 61, gives the terms of this promulgation.

2. Art. 362, in the second part.

3. On the toleration of this *Notheivilehe*, cf. HOLLWECK, o. c., p. 39-42.

a/ The abrogation, pure and simple, of art. 16 of the Belgian Constitution, or at least of the penalties imposed thereby, would be the most logical course. Many of the opponents of the Church are themselves of this opinion ⁽¹⁾.

b/ If this abrogation cannot be brought about, an attempt should be made to avoid the consequences of the law. There are various ways of doing this :

Either the practice of the courts might be confined to the natural interpretation of the law ; and then, as the prohibition and the penalty affect only the nuptial blessing and the religious ceremonies ⁽²⁾, the priest who assisted at a marriage simply as the authorized witness, without any sacred rite, would not be liable to the penalties.

Or the interpretation of the Decree *Ne Temere*, art. VIII, proposed above (n° 69), might be put in practice : the marriage would be validly contracted without the priest, before two witnesses only, in the case in which the parish priest, in consequence of the law of precedence, could not give his assistance without incurring the penalty. We may remark that the Belgian law and its penalties affect only the *sacred minister*, and not the witnesses or the contracting parties. The law certainly recognises co-operation in the offence, as we have said in n° 230 (and on this ground it might, perhaps, hold the witnesses liable equally with the priest who assists at a marriage), but then every co-operation presupposes an offence, and there is no offence where there is no intervention on the part of the priest. Cf. the *Coll. Brug.*, t. XV, p. 106, together with the note.

c/ Finally, there remains a less radical remedy, which has hitherto been progressively employed ; viz., on the one hand, the law of precedence itself might be mitigated ⁽³⁾, and on the other hand, those civil formalities

1. To this effect speak *Le Peuple*, l. c. and *La Chronique*, l. c.; the latter concludes in these terms : « Nous sommes d'avis d'aller plus loin (que M. Woeste) et de supprimer tout simplement l'art. 267 du Code Pénal. Nous sommes ainsi conséquents avec nous-mêmes ; nous avons toujours dit que ce qui se passe à l'église ne nous regarde pas ».

It is surprising to find BOUDINHON, in the *Canon. Contemp.*, 1906, p. 641 s., opposing the abrogation of this clause in France, as injurious in practice ; and the *Revue prat. d'apolog.*, apparently agreeing with him.

2. The very wording of the law, which ought to be strictly interpreted, suggests this, as also does the object that the legislators had in view, when this provision was first introduced. Cf. SCHAEPMAN, *Ned. Kath. Stemmen*, 1905, p. 368 s., and in his brochure already quoted, p. 23. We may also add the interpretation, in agreement with this, given by the Supreme Tribunal of Holland, on the 22th of July 1850, (*Ned. Kath. Stemmen*, p. 366). See also BALOG, o. c., p. 38 s. ; VAN DE BURGT-SCHAEPMAN, o. c., n° 248.

3. This is what was done by the Belgian law of 3 Aug. 1909, enacting that marriages *in extremis* should be withdrawn from the law of precedence. This

that more especially give rise to conflict between the civil and ecclesiastical law might be modified (¹).

V. PRACTICAL CONCLUSION.

So long as obligatory civil marriage, together with the unfortunate obligation of precedence, is maintained, the following rule should be followed in this matter :

233.
Practical conclusion.

1. Civil marriage between unbaptized persons, should be regarded as valid, provided there is no transgression of the divine and natural law.

2. Civil marriage between Christians, or between a baptized and an unbaptized person, looking at it *as such and in its nature*, must be regarded as a pseudo-marriage, as a simple formality devoid of validity. It is not, in itself, anything more than a merely civil ceremony, carrying with it only civil effects, supposing that there is already a canonically valid bond (²). The State has no competence or power over Christian marriage, as is sufficiently clear from the principles that we have established above(³).

We say : civil marriage looked at *as such and in its nature*, that is to say, abstracting from the *intention of the contracting parties*. For, in fact, this intention may sometimes be, not to go through a simple ceremony with a view to its civil effects, but to contract a real marriage. In this case, if the

same exception, suggested as it was by art 16 of the Belgian Constitution, is in force in Germany also (*Rev. ecclés. de Metz*, 1900, p. 338) ; and in 1900, it was proposed in Holland, together with another dealing with the case of a couple who, not being in danger of death, formally declare that they are living together in concubinage. Cf. SCHAEPMAN, o. c., p. 34 ; compare with the *Tijd*, 1900, 9, 10 and 11 Oct. ; the *Bien Public*, 13 Oct. 1900. In Hungary this latter case is admitted according to the text given in *Balog*, o. c., p. 10.

1. This is the object of the Belgian laws of 26 Dec. 1891, on the subject of the antenuptial proclamations, (see above, n° 46) ; of 16 Aug. 1887 and of 30 Apr. 1896, on the subject of parental consent ; and that of 7 Jan. 1908, concerning certain formalities in the celebration (above, n° 83) ; as well as of other laws of minor importance, all of which are given and explained in the appendix to the *Compte-Rendu* of the Society of Saint Francis Regis, 1883-1892 and 1893-1900.

2. This is why the Sovereign Pontiffs and the Roman documents declare civil marriage null, and assimilate it to concubinage, as is shown by HEINER, *Gültigkeit oder Ungültigkeit der Civilehen*, p. 475 s. and 477-480.

3. HEINER, l. c., p. 475 and 477 (coll. *A. A. S.*, IV, p. 380 ss., in the *Causa Argentinæ*. 23 Febr. 1912), denies to the civil union the character of a true marriage, because, as he says, it is legally dissoluble, and consequently deprived of an essential quality. In our opinion, the true reason lies deeper, and rests upon the very nature of Christian marriage, which is within the exclusive competence of the Church ; this reason holds good even where civil divorce is not legally in force, as, for example, in Italy.

contracting parties are not subject to the decree *Ne Temere*, their marriage is *valid*, not on account of the observance of the civil formalities and in virtue of the civil law, but because, in observing these, they emit a naturally valid matrimonial consent (GASPARRI, o. c., II, n° 1228⁽¹⁾); if they are bound by the Decree, they contract a marriage that is invalid on the ground of clandestinity; their marriage will also be invalid in itself, unless it is certain that they had the intention of emitting true conjugal consent; but, supposing this, there is no reason why their marriage might not sometimes be subsequently revalidated *in radice*, though the canon law does not recognise in it the appearance of marriage⁽²⁾ (see below, n° 408, and above, n° 92). Observe that such civil marriage is included in the term *contracted marriage*, of which mention must be made when asking for a dispensation (cf. below, n° 381, 6).

3. Although the State claims for these civil formalities the validity of a real marriage, the Church tolerates their observance by the faithful, even before the celebration of the religious marriage. We may go further and say that, as a general rule, in view of the exigencies of the law, those about to

1. Under these circumstances there is reason *to presume* a real matrimonial consent, and it is in fact admitted that the presumption is then in favour of the validity of the marriage. This is easily understood in the case of two non-catholics who contract a civil marriage; generally speaking, they will look upon the civil union as a real marriage. In the case of Protestants it is still more natural, considering their conception of the matrimonial contract. In mixed marriages in Germany and in Hungary, apparently the same presumption is admissible, seeing that the Catholic party is conscious of his exemption from the general laws of the Church, and therefore concludes that it is possible to contract a real marriage under the civil ceremonies. Observe, however, that it is only a question of a presumption, and it is necessary to see that it is realised in each case as it occurs. Cf. HEINER, l. c., p. 483-491, and A. A. S., IV, p. 388; BOUDINHON, *Canon. contemp.*, 1912, p. 4463., BÖCKENHOFF, *Strassb. Diözesanblatt*, 1911, p. 18 s.; cf. the *Causa Colon.*, of 27 Aug. 1910, in the A. A. S., II, p. 917 ss., and especially p. 922 and 928. See also above, n° 92, where we have observed that unions of this kind have the appearance of marriage.

2. To obtain the *sanatio in radice*, it would be necessary first of all to make sure of the intention the parties had in contracting their civil union. The true matrimonial intention is natural in this case with those who are devoid of all Christian sense, and are supporters of the supremacy of the State, so that they take no thought of the law of clandestinity by which they are bound. On the other hand, there will be great difficulty in admitting it in the case of instructed Catholics, who know quite well that civil marriage is a mere formality in itself. Had such persons wished to give real matrimonial consent, they would naturally have done so before the minister of the Church, not before the civil officer. Cf. A. A. S., IV, p. 386 s.

marry should be compelled to comply with the civil requirements, so that their marriage may not be deprived of its civil effects or occasion any dispute. *As a general rule*, parish priests cannot even admit the contracting parties to religious marriage without evidence that they have complied with the legal formalities ⁽¹⁾.

The Church only requires that the faithful should know that they contract a real marriage, only at the time when they give their mutual consent before the Church ; and that they go through a mere formality in the presence of the civil officer ⁽²⁾.

4. The Church permits its priests, in various countries, to discharge the duty of civil officers, and preside at the celebration of civil marriages, of those at least that are not contrary to the divine or ecclesiastical law ⁽³⁾.

1. Cf. the *Instr. S. Poen.*, of 15 Jan. 1866 (*Collectanea*, n° 1406 ad 5^m and 6^m). As a proof in confirmation of the tolerant spirit of the Church in this matter, at the commencement of the present year, 1911, a rescript of dispensation affecting the diocese of Bruges was granted by the Holy See, in a case of lawful affinity in the first degree in the collateral line, but with a prohibition forbidding the use of the dispensation before the royal dispensation from the civil impediment had been obtained with a view to the civil marriage.

On the other hand, in the same *Instructio*, ad 7^m, the S. Poenitentiaria declares that, when there is an obligation of giving precedence to the civil ceremony, « the marriage before the Church must be contracted as soon after as possible ». The *Liber Manualis Brugensis*, p. 167, strongly maintains the same opinion, and directs parish priests to see that the religious marriage is celebrated on the same day as the civil formalities take place.

2. As ROSSET remarks, o. c., n° 2371, following the Secretary of the S. C. C. in the discussion of a case proposed in 1879 : « The parties who contract before the civil authority, though they utter the same words or perform the same actions as before the parish priest, do not thereby exchange true internal matrimonial consent before the civil officer, nor are they guilty of a falsehood. For, the words and signs that they are compelled to make use of at the of *mairie*, simply signify their deference to the civil law and their obedience to its prescriptions, for the purpose of assuring to their real marriage, already contracted or about to be contracted, the desired civil effects. The signification of their act is thus restricted by the teaching and law of the Church, in accordance with which the contracting parties intend to be married ; or again by the common opinion and usage of the faithful ; or finally, by the conditions requisite for the lawfulness of the matrimonial contract in accordance with the very nature of the same. Hence the words and acts in question are not fitted to express true and internal consent to the marriage at the *mairie*, since they necessarily tend to have a different signification, and are confined to that, in all those numerous cases in which the interested parties have no intention of marrying at that moment ».

3. See the decrees of the C. S. O. of 20 Dec. 1837, of 11 Dec. 1850, of 12 Jan.

5. Cases may occur in which, on the one hand, there is urgent need of religious marriage, either to put right matters of conscience for one of the parties, or to legitimate the children, and in which, on the other hand, civil marriage is impossible on account of want of time or for some other reason. One must then make use of the method proposed in nos 69 and 232, i. e., make arrangements for the marriage to be duly contracted in the presence of two witnesses. If this cannot be done, the parish priest must take courage, and fear not to discharge his office, notwithstanding the provisions of the *Code Pénal*; but he must nevertheless act with prudence so as to avoid, as far as possible, the risk of prosecution and punishment.

Note. The Society of St. Francis Regis ⁽¹⁾ is an invaluable assistance in solving the difficulties to which the question of civil marriage sometimes gives rise, as well as in obtaining the official acts required by law, and the faculties necessary on certain occasions. The number of marriages facilitated or regularised by it, especially among the poorer classes and the foreign colony resident in our country, increases day by day.

1881 (*Collectanea*, nos 1523, 1525 and 1533) and of 26 Jan. 1895 (in the *Can. Cont.* 1895, p. 501); they concern the assistance of the priest, as civil officer, at the marriage of *non-catholics*, and are sometimes more, sometimes less severe. The conclusion drawn from them is, that such assistance cannot be considered as *universally* tolerated. As to the case of a person who, being validly married before the Church, but civilly divorced, wishes to contract a civil marriage with a third person, it seems that the assistance of a priest, as civil officer, is always forbidden.

We have stated above, in no 214, that such assistance may be tolerated on the part of the lay civil officer; but the reason of public good which we could there allege, evidently does not exist here.

1. This society has its head office at Brussels, rue des Minimes, 39. The diocese of Bruges has four affiliations in the places given at the end of the Calendarium. Every year there is issued the « *Compte-rendu de la Société de S. François Régis* ». The latest numbers of this Report are particularly interesting, as they give the consoling results that have crowned the efforts of the members, together with the text and the happy effects of the new matrimonial laws.



ERRATA

READ :

Page	Line		
34	27	unlawful	unlawful
42	14	Nevertheless	Nevertheless
50 (margin)		public	high
50	19	holidays	Holidays
50	22	Days	Day
51	21	holidays	Holidays
52 (margin)		practical	practical
61	10	Appendix	Scholion
63	32	into	into
64	3	has	have
64	5	does	do
64	21	or... either	either... or
79	38	by	be
80	22	therefore	therefore
86	39	expediency	expediency
87	16	witness	witness
88	33	finally	finally
91	1	through	though
107	41	Council	Council
131	1	Section	Paragraph
136	5	Germany	Germany
136	11	which	which
144	39	orders	Orders
149	28	no	nor
151 (margin)		adultery	adultery
153	19	a condition	a condition
155	26	Husserak	Husserak
159	28	must	must
165	27	note 2	note 1
176	3	Christns	Christians
184	28	in	is
195	6	to-day other	to-day other
195	29	protection	protection
196	28	occured	occurred
203	23	which	which
204	2	crows	crowns
204	8	which	which
234	7	questions	question
262	20	or	of
275	16	point	points
279	4	appearance	appearance
286 (margin)		he	the
293 (margin)		the law monogamy	the law of monogamy
302	28	socialistic	socialist
314	15	climæd	claimed
373	42	Envel. Britannica	Encycl. Britannica
404	32	christianorum	christianorum
422	21	regard the	regard to the
405	36	occassion	occasion

ADDENDA.

P. 119, l. 21: The same application may occur in England, namely in the case where the marriage cannot be celebrated in a « licensed building ».

P. 121-122 : note 2 : We may add to the list of Authors favouring the opinion therein supported : LEHMKUHL, o. c., 11th ed., II, p. 892 ; SALSMANS, in GENICOT-SALSMANS, o. c., II, n° 500 ; WOUTERS, o. c., in the 4th edition recently published, p. 69 s. ; Dr KNOCH, in *Rev. eccl. de Liège*, VIII, p. 145.

On the other hand, *Boudinhon*, quoted among those who share the other opinion, attempted a fresh discussion in the *Rev. du cl. fr.*, t. LXX (1912), p. 594 s.

P. 129 (margin, n° 75) add after « himself that » : the contracting parties are free from any impediment, and especially from any matrimonial tie.

P. 130 (on the top of the margin) add : in the case of vagi, the permission of the Ordinary is required.

P. 383 add marginal number 212, before 4.

2308

